RISKY BUSINESS: EFFECTS OF NEW JOINT EMPLOYER STANDARDS FOR SMALL FIRMS

HEARING

BEFORE THE

SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS

OF THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

HEARING HELD
MARCH 17, 2016

Small Business Committee Document Number 114–050
Available via the GPO Website: www.fdsys.gov

U.S. GOVERNMENT PUBLISHING OFFICE
99–483 WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

HOUSE COMMITTEE ON SMALL BUSINESS

STEVE CHABOT, Ohio, *Chairman*
STEVE KING, Iowa
BLAINE LUETKEMEYER, Missouri
RICHARD HANNA, New York
TIM HUELSKAMP, Kansas
CHRIS GIBSON, New York
DAVE BRAT, Virginia
AUMUA AMATA COLEMAN RADEWAGEN, American Samoa
STEVE KNIGHT, California
CARLOS CURBELO, Florida
MIKE BOST, Illinois
CRESENT HARDY, Nevada
NYDIA VELÁZQUEZ, New York, *Ranking Member*
YVETTE CLARK, New York
JUDY CHU, California
JANICE HAHN, California
DONALD PAYNE, JR., New Jersey
GRACE MENG, New York
BRENDA LAWRENCE, Michigan
ALMA ADAMS, North Carolina
SETH MOULTON, Massachusetts
MARK TAKAI, Hawaii

KEVIN FITZPATRICK, *Staff Director*
EMILY MURPHY, *Deputy Staff Director for Policy*
JAN OLIVER, *Chief Counsel*
MICHAEL DAY, *Minority Staff Director*

CONTENTS

OPENING STATEMENTS

WITNESSES

APPENDIX

RISKY BUSINESS: EFFECTS OF NEW JOINT EMPLOYER STANDARDS FOR SMALL FIRMS

THURSDAY, MARCH 17, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Cresent Hardy [chairman of the Subcommittee] presiding.

Present: Representatives Hardy, Chabot, Kelly, Velázquez, and Adams.

Chairman HARDY. Good morning. Thank you for being here. I call this meeting to order.

Owning your own business and being your own boss is part of an American dream. Many Americans pursue that dream by using proven business models, like subcontracting and franchising, which results in the successful businesses that provide jobs for millions of Americans. However, the National Labor Relations Board and the Department of Labor are threatening those business models by changing their joint employer standards. Being deemed a joint employer has huge ramifications. If two businesses are determined to be joint employers, one could be held liable for the other's compliance with the Federal labor laws.

Last year, the NLRB issued a decision that changed its 30-year-old joint employer standard. Under the new standard, two companies could be classified as a joint employer based on the mere potential to control the terms of the conditions of employment. In January, the Department of Labor issued joint employer guidance. The DOL effectively abandons the existing Fair Labor Standards Act regulations by declaring that it will apply economic realities test to determine if there is a joint employer relationship. These ambiguous standards are injecting more uncertainty into a variety of business relationships. Because of increased liability, larger companies may try to reduce the risk by asserting more control over small businesses that they contract with or ending business relationships. Business models that have provided entrepreneurs with the opportunity to live the American dream may no longer be viable. I believe these misguided policy changes are a threat to small businesses and need to be reconsidered before significant damage is done to this vital sector in the American economy.

I appreciate all the witnesses being here today. I look forward to your testimony, and I yield to Ranking Member Adams for her opening remarks.

Ms. ADAMS. Thank you, Mr. Chair.

Prior to 1935, workers had few rights to freely engage in activities to improve working conditions or pay. As a result, less than 10 percent of the population was unionized. With enactment of the National Relations Labor Act and creation of the National Relations Labor Board that year, workers' rights were greatly improved. Union membership tripled by the 1950s. Today, however, participation has slipped to nearly pre-NLRA levels, just 12 percent of the workforce. This drop in worker organization has coincided with a desire by businesses to distance themselves from the workforce through the use of contractors and temporary staffing agencies. Currently, over 3.4 million workers are temporary status, while millions more work for contractors. This business-to-business arrangement primarily benefits the parent company. They can shift the burden of dealing with payroll, benefits, and most importantly, compliance with the NLRA, to the contractor. This sharp increase in nontraditional employment has coincided with a change in the joint employee standard in the early 1980s. At that time, the Republican-led NLFB articulated a new, stricter definition of what constitutes a joint employer where the parent company had to have direct control over operations, hours, or working conditions to be liable for violations of the NLFA. After the ruling, the use of temps and contractors grew and workers' rights suffered.

In an effort to better protect vulnerable workers, the NLRB recently changed course on how to determine when multiple companies are joint employers. The new test announced in Browning-Ferris no longer requires that both employers actually exercise the authority to control terms and conditions of employment. Instead of both our employers within the meaning of the common law and share in determining the essential terms and conditions of employment, they will be deemed joint.

The reaction to the ruling has been mixed. Labor rights experts have lauded the decision as a return to the original intent of the law. They also contend the shared responsibility under the recent decision should result in better oversight and compliance with important labor laws. The impact on workers is particularly important, and I am eager to hear from today's witnesses on this issue. Critics, on the other hand, claim the change will negatively impact the small-business community. However, bringing the larger corporation to the bargaining table could provide small businesses with support and resources that they would otherwise not have in labor disputes before BFI decision.

I look forward to hearing from our witnesses today regarding this concern, and one thing that both sides seem to agree on is that it will have an impact on unionizing. With the NLRB indicating the previous standard was too restrictive, allowing companies to skirt labor laws and collective bargaining rights, unions are likely to be embroiled to bring more joint employers to the bargaining table. I think we can all agree that it is important for businesses to follow applicable labor laws. I hope we can use today's hearing to explore how the BFI case and subsequent developments at the Department

of Labor will impact both workers and businesses, and I look forward to hearing from the witnesses. I thank you for your participation today. I yield back, Mr. Chair.

Chairman HARDY. Thank you.

Okay. If Committee members have any opening statements prepared, I ask that they be submitted for the record.

I would like to explain how things work around here. You have a light in front of you. You will each have 5 minutes to deliver your testimony. That light will turn green when you start and with 1 minute remaining, the light will turn yellow. Finally, at the end, it will turn red after the 5 minutes. I would ask you to adhere to those rules the best you can.

Now, I would like to do some introductions for our witnesses. First, we have Mr. Vinay Patel, president and CEO of Fairbrook Hotels in Chantilly, Virginia. He has received several hospitality industry awards, including the Presidential Award by Carlson Companies for the Country Inn and Suites for achieving the highest level of operation of excellence. Mr. Patel holds a bachelor of science in marketing and business administration from Virginia Commonwealth University, and is testifying on behalf of the Asian American Hotel Owners Association (AAHOA). Thank you, Mr. Patel for being here.

Up next we have Mr. Danny Farrar, CEO of SoldierFit, a fitness company that he co-founded in 2013. Mr. Farrar is an Army veteran who served in Iraq. SoldierFit, which is based in Frederick, Maryland, is about to open its fourth location and recently awarded two franchises. In addition, SoldierFit was just named as the Eastern region's finalist for the U.S. Chamber of Commerce Annual Dream Big Small Business of the Year Award. He is testifying on behalf of the Coalition to Save Local Businesses. Mr. Farrar, thank you for your service, and thank you for being here. We appreciate everything you do here today.

With that, I yield to Ranking Member Adams for her introduction of the next witness.

Ms. ADAMS. Thank you, Mr. Chair.

Harris Freeman is a professor of legal research and writing at Western New England University School of Law and a visiting professor at the Labor Relations and Research Center at the University of Massachusetts. He has taught labor and employment law since 1999, and in 2009, Governor Patrick appointed Professor Freeman to the Commonwealth Employment Relations Board, the appellant agency body that oversees public sector labor relations in Massachusetts. He served on that body until 2016. Professor Freeman's writings on labor and employment law have appeared in numerous reviews and labor study journals, including the Employee Rights and Employment Policy Journal, and Working USA, a journal of labor and society. Mr. Freeman, we welcome you today.

Chairman HARDY. Thank you. Our final witness is Mr. Kurt Larkin, a partner in Hunton and Williams in Richmond, Virginia. There he helps businesses of all sizes solve labor and employment challenges. Mr. Larkin previously served in the United States Army, Judge Advocate General Corps, and received the Meritorious Service Medal, the Army Commendation Medal, and the Global War on Terrorism Service Medal. He has received a law degree

from Temple University and his bachelor's degree from Dickinson College. Mr. Larkin, thank you for your service, and thank you for being here today.

With that, Mr. Patel, we will start with you, and we have 5 minutes. Thank you.

STATEMENTS OF VINAY PATEL, PRESIDENT AND CEO, FAIRBROOK HOTELS; DANNY FARRAR, CEO AND FOUNDER, SOLDIERFIT; HARRIS FREEMAN, PROFESSOR OF LEGAL RESEARCH AND WRITING, WESTERN NEW ENGLAND SCHOOL OF LAW; KURT LARKIN, PARTNER, HUNTON AND WILLIAMS LLP

STATEMENT OF VINAY PATEL

Mr. PATEL. Chairman Hardy, Ranking Member Adams, members of the Committee, I would like to thank you for the opportunity to testify before you today and to share with you my experience as a small-business owner. I look forward to a constructive discussion about how the new joint employer standard will negatively impact my business.

My name is Vinay Patel. I am a first-generation American and proud small business owner from Herndon, Virginia. I am appearing today not only as a hotelier but also as a volunteer board member of the Asian American Hotel Owners Association. AAHOA represents more than 15,000 small business owners who own nearly 50 percent of all hotels in the United States.

My story is just like that of thousands of first and second-generation American entrepreneurs. I was born in Malawi, Africa, to parents of Indian origin. My family moved to the United States in 1980 and bought a small, 27-room motel. We lived at this motel and did everything, from cleaning rooms to maintenance, and I would pop out of my living room to rent rooms to guests that would come in. This is where I learned the most important lessons in life of hard work, commitment to family, and community service. After graduating from college, we built a second property from the ground up, a 15-room Royal Inn Motel, where my wife Tina and I ran the motel and did every aspect of the business.

After running the motel for 2 years, I decided it was time to take a risk and grow the company, so I began to look for opportunities in franchise hotels. While my ambitions were high, so too were the hurdles. Brand after brand turned me down due to lack of experience in franchise properties. After struggling to find a brand partner, Carlson Hotels took a chance on me and I was able to open up the first Country Inn Suites in Virginia in 1995, creating 15 new jobs. Today, I have 11 hotels between Maryland and Virginia and work with major brands, including Carlson, Hilton, IHG, Wyndham, Choice Hotels, and proud to employ over 150 associates.

I have explained my history in the hotel industry to show you how difficult it is to succeed as a small-business man. For this reason, the new joint employer standards are very concerning. Having faced challenges of two unbranded properties to start my career, franchising provided me the best business model to expand my operations and create hundreds of jobs. As a franchisee, I pay a license and royalty fee. In return, I display a nationally recognized

sign on our property and benefit from a wide-reaching marketing campaign and a frontline reservation system.

Most importantly, I own and operate my own small business. I take all of the financial risk. I make all of the day-to-day decisions at the hotels. The franchise business model is the best vehicle for small business ownership in the lodging industry. Changes in this model would discourage entrepreneurship and create uncertainty between employers and employees. The standard of the employer liability that existed for more than 30 years was simple, clear, and concisely defined and defined the relationship between employees and me.

Under the new standard, franchisors may be subject to liability based on actions of franchisees. As a result, they will likely choose to work with larger franchisees and forego small business owners like myself. They would have no choice but to exert control over the daily operations of my business. I would cease to be an independent small business owner and would be subject to the directives of a large corporation. Ultimately, I would become a de facto employee of a corporate brand.

Most threatening to my business is the Department of Labor's characterization of employer labor. The Administrator's interpretation directly takes aim at the hospitality industry. It suggests that I jointly employ my staff with the franchisor, simply because they are wearing shirts bearing the name of the national brand.

As I mentioned before, the license agreement allows me to use the logo for marketing. Ultimately, I employ my team. I sign their paychecks, regardless of what logo is on their shirt. In my experience, there is no circumstance in which the national brands dictate the tasks of my employees.

Frankly, if these burdensome circumstances existed when I entered the business, I would not have chosen the entrepreneurship path. The new rule threatens my ability to own and operate my business, to create and maintain good jobs, and the stability of a franchise model.

Chairman Hardy, Ranking Member Adams, and the distinguished members of the Committee, I thank you for the opportunity to speak today. I urge this Committee to pass legislation that would reestablish the traditional joint employer standard that has allowed my family to realize the American dream of small business ownership. Thank you.

Chairman HARDY. Thank you for your testimony.

Mr. Farrar?

STATEMENT OF DANNY FARRAR

Mr. FARRAR. Good morning, Chairman Hardy, Ranking Member Adams, and distinguished members of the Subcommittee. My name is Danny Farrar, and I am the CEO and co-founder of SoldierFit. I am humbled by your invitation to speak on behalf of hundreds of small business owners like myself, who are members of the Coalition to Save Local Business.

Mr. Chairman, I am an 8-year military veteran who served in the United States Army, including a combat tour in Iraq; a former firefighter and EMT; and a certified personal trainer with over a decade of experience. Today, I am a small business owner and en-

trepreneur. We operate three gyms in Maryland and will soon open our fourth. I am also a franchisor. We recently awarded our first two franchises to further grow our concept. So while some people hear the term franchise or franchisor and think only of major corporations, they can also think of me, my small business, and my story, and the story of hundreds of thousands of both franchisors and franchisees who are small business owners.

Together with my friend and one-time mentor, Dave Posin, I cofounded SoldierFit, a fitness company committed to the ideals of community, patriotism, and pursuit of the American dream. I am also the president and co-founded of Platoon 22, a nonprofit started to combat the depression and dislocation that at least 22 veterans a day take their own lives. We are helping brave service men and women who have charged into combat on behalf of our Nation only to return scarred physically, mentally, or both, just as I once was.

So as you can see, I have held many positions throughout my life, and the threat of unlimited, unpredictable joint employer liability is very scary. It threatens everything my partners and colleagues have worked for in order to build our community.

While today I appear before you as a small business leader, my road here was long and challenging. Mr. Chairman, I was adopted at age 2. I graduated from high school 146 out of 147. I left for boot camp after graduation, and on September 11, 2001, I took the first team for the Army into the Pentagon to aid in search and rescue for survivors and remains. In the days that followed, I took jobs here and there but I soon ended up homeless. I once again turned to the military and deployed to Iraq where I completed over 700 convoy missions. I have been blown up and shot at at just about any place you can get blown up and shot at. When I returned home I hit rock bottom. I drank, I self-medicated, and ultimately decided that my life was not worth living and attempted suicide. Somehow I got a second chance.

Today I lead a company that has been the recipient of several small business awards from the U.S. Chamber of Commerce in the State of Maryland, as well as I was featured on the cover of Men's Health magazine. I have gone from the kid who barely graduated high school to giving the commencement address at one. But Mr. Chairman, the National Relations Labor Board threatens everything that I and millions of small-business owners have built. When the NLRB decided to change the joint employer liability standard in August of 2015, it was a scary moment for local business owners like myself. For decades, the joint employer standard had protected businesses like mine from the liability of employees over which we have no actual or direct control. That has always made sense. But now in adopting this new, ambiguous, indirect, and even reserve control standard, the NLRB has made employers potentially liable for employees they do not employ. That is nonsense.

Mr. Chairman, from the perspective of small business, it appears that Washington regulators are attempting to facilitate a corporate takeover of Main Street. If regulators make large, primary companies liable for the employment actions of third-party vendors, suppliers, franchisers, or subcontractors over which they have no direct control, large companies may be compelled to exercise more

control over these small businesses to limit their new liability. Consequently, local business owners may effectively be demoted from entrepreneur to middle manager as they are gradually forced to forfeit operational control of their stores, clubs, inns, or restaurants that they built. Thus, the joint employer means big companies will get bigger and small business may run out of business partners and ultimately fade away.

On another note, Mr. Chairman, many local business owners are nervous about the implications of joint employer on their future access to capital. The members of this Subcommittee well know that the Small Business Administration Loan Guaranty Program is critical for creation of growth of small business, as it was for SoldierFit. But as SBA considers changes to its loan approval process, it is important for the agency to keep in mind, however, anti-small business federal agencies are changing the definition of joint employer and how they may reduce that access to capital.

I urge the Subcommittee members to protect small businesses' access to SBA loan guarantees. The bottom line on the joint employer as a threat to small business, Mr. Chairman, is this: no one can assure me that my business, or anyone else's business, may not run afoul of a vague, joint employer liability standard based on indirect or even unexercised reserved control. That is why I and so many small business owners around the country need help. We are asking Congress to pass a simple, once in its legislation contained in H.R. 3459, the Protecting Local Business Opportunity Act.

Mr. Chairman, this country allowed me to achieve the American dream, and I found a small business committed to enabling others to achieving their American dream. Please protect small businesses like mine and give us certainty that federal agencies in Washington are not going to needlessly threaten our business.

Mr. Chairman, thank you for your leadership on this issue, and I would be happy to answer any questions you have. God bless.

Chairman HARDY. Thank you, Mr. Farrar.

Mr. Freeman?

STATEMENT OF HARRIS FREEMAN

Mr. FREEMAN. Good morning. I would like to thank chairman of the Subcommittee, Congressman Cresent Hardy, Ranking Member Congresswoman Alma Adams, and the other members of the Subcommittee for this opportunity. I have two points to make this morning.

First, the more inclusive joint employer doctrine adopted by the NLRB and Browning-Ferris was an appropriate response to the rapid expansion of subcontracting and precarious low-wage work. Second, the BFI joint employer standard will do no harm to America's small businesses even as it provides a potential path to meaningful collective bargaining for a significant sector of the low-wage workforce.

I begin my remarks by focusing on the industrial realities of low-wage temping and franchising arrangements because it is believed that BFI will have an impact on employment in these arenas.

Temporary staffing and franchising account for a disproportionate share of the economic growth since the Great Recession of 2008. Close to 3 million employees working temp positions and an-

other 2.8 million working just the fast food sector of franchising. And while profits are high in these sectors, poverty-level wages, underemployment, extraordinarily high rates of wage theft pervade the temporary staffing industry in franchise fast food outlets and janitorial services.

For example, temp workers comprise three-fourths of the 150,000 workers who load and unload goods at warehouses used by Walmart and other big box stores in Chicago. As temps, they experience a large wage penalty, earning $9 an hour, $3.48 lower than direct hires. Two-thirds live below the poverty level. Households that include fast food franchise workers are four times as likely to live below the poverty level. As a result, taxpayers shell out $3.8 billion a year to subsidize public benefits for these workers.

This type of systemic inequality and poverty also hurt small business owners. Like their employees, many franchise owners—not all, but many—are squeezed by big franchisors who impose nonnegotiable terms of engagement on franchise owners that tend to push down wages, promote costly churning of the workforce, and significantly create high failure rates for franchise owners.

The BFI decision should be understood in this context as a proper exercise of the Board's statutory authority, and it is in no way radical. The basic joint employment test has not changed. It remains a case-specific, fact-intensive inquiry to determine whether an employer shares or codetermines the terms and conditions of employment.

What the NLRB did do is return to their traditional joint employer test endorsed by the Supreme Court 50 years ago. This closed a loophole created by board rulings in the 1980s. Now, the inquiry is broader. The Board no longer is limited to examining whether an employer controls employees directly and immediately; instead, a traditional, multifactor common law inquiry is used. The BFI case illustrates how this works. In a representation case, the NLRB found that the recycling center maintained legal control over 240 long-term temps by issuing precise directives to hire, to fire, to control the line speed, and other aspects of the work environment. These directives were given directly by BFI and through the supervisors of the temporary staffing agency onsite.

The terms of the temporary staffing agreement also expressly ceded the right to control the workforce to the recycling center. The Board concluded that the recycling center was a joint employer because BFI affected the means and the manner by which employment was directed there.

Nothing in this ruling presents a new or heightened level of legal uncertainty for large or small employers that use temps in staffing. The NLRB has made it clear that a potential finding of joint employment arises when the structure of staffing arrangements cedes to the user firm an extensive level of direct or indirect control over the means and manner of work.

It is also clear that BFI does not predetermine or rig the outcome of joint employer inquiry and franchising. This was made clear by the General Counsel a year ago in a detailed advice memorandum that applied the BFI case to a franchise in Nutritionality. The advice memo concluded that the franchise agreement and directives did exercise control over brand and product quality, but in no way

did it exercise any control over the terms and conditions of the employees at the franchise outlets. The unfair labor practice case was dismissed without a hearing.

A different result may, of course, arise when you have a tightly controlled business format franchisee agreement, but the Board has not yet addressed and finalized any kind of inquiry into this type of scenario, but the Board has provided significant guidance for franchisors. The General Counsel has said that they should be exempt from a finding of joint employment if they are only controlling work conditions to support brand quality and the brand name. The statement of the General Counsel has recognized that not all franchisors—in fact, most franchisors—will not be joint employers.

In conclusion, it is my view that the Board's revival of the traditional joint employer standard is an appropriate exercise of the statutory authority granted to it by Congress, particularly when considered in light of the NLRB's obligation to apply labor law to changing economic realities. It is a flexible test for employers and it is also positive and allows fair treatment and decent wages for low-wage temp workers.

Thank you for considering my comments.

Chairman HARDY. Thank you, Mr. Freeman.

Mr. Larkin, I apologize. As you heard the alarms, we have been called to votes on the floor, so we are going to recess for probably—reconvene somewhere around 10 til the hour, so I apologize for that. We are in recess.

[Recess]

Chairman HARDY. We will reconvene this meeting.

Mr. Larkin, thank you for waiting, and begin with your testimony. You have 5 minutes.

STATEMENT OF KURT LARKIN

Mr. LARKIN. Thank you, Chairman Hardy, members of the Subcommittee.

It is a privilege to be here with you today to talk about an issue of critical importance to American small business: the executive branch's ongoing efforts to expand the legal standards for determining if one business is the joint employer of individuals employed by another business.

For over 30 years, the NLRB adhered to a fairly straightforward joint employer standard. The Board treated separate companies as joint employers if they shared or codetermined essential terms and conditions of employment. The Board would look to whether the putative joint employer exercised meaningful control over hiring, firing, discipline, compensation, supervision, and direction, and whether its control over such matters was direct and immediate. This standard was easy for businesses to understand and, more importantly, to plan for.

But that all changed this past summer. In August of 2015, the Board departed from this precedent in a case called Browning-Ferris Industries and announced a test of sweeping scope that could redefine the employer-employee relationship across all areas of business. Now, under this new test, the Board may find a business to be a joint employer where it has the mere potential to control the employment terms of another business' employees, or where it

exercises such control but only indirectly. This leads to an obvious question: if a putative joint employer never actually exercises direct control over the employees of another company, how much retained or indirect control is sufficient to establish joint employer status?

Well, the murky guidance provided in the board's opinion makes this question virtually impossible to answer. Now, some have argued that the Browning-Ferris case dealt with a temporary staffing firm and its client and that other business models were unaffected by the Board's decision. But the potential control and indirect control standards announced in the case are broad enough to cover virtually any business relationship, including general contractor and subcontractor, outsourced service provider and user of outsourced service, parent and subsidiary, and franchisor/franchisee.

The NLRB is not the only federal agency that has waded into the joint employer conversation in recent months. This January, the Department of Labor's Wage and Hour Administrator issued formal guidance on the joint employer standards under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. The guidance goes into detail on the concept of vertical joint employment, which the DOL defines for the first time as when the employee of one company is economically dependent on another company, which retained the services of his or her employer.

The FLSA regulations do not address this concept. Instead, it is addressed in the Migrant Act, a statute with a very narrow and specific legislative purpose; to combat the abuse of migrant farm labor workers in this country. The DOL's new guidance cleverly imports that standard into the FLSA and encourages investigators to pursue vertical joint employment and wage and hour investigations. The DOL appears to have worked on this guidance in secret. They certainly did not solicit the input of the employer community.

Those in favor of these actions claim that expanded joint employer liability is a good thing; that it will combat against unscrupulous employers who take advantage of the growing contingent workforce. That approach assumes, incorrectly in my view, that the use of temporary employees is always somehow inappropriate. Regardless, these legal standards make no exception for the scrupulous employer, whatever that might mean, and they sweep with a broad brush across all industries and virtually all types of business relationships ensnaring arrangements that are perfectly legal and vital to the growth and success of small business in this country.

And as for the Freshii Board memorandum, Board advice memoranda are nonbinding, have no effect on how the full Board decides a later case, and they do not bind the Board's General Counsel. And Freshii was issued prior to the Browning-Ferris decision, making it all but obsolete. Ultimately, uncertainty over how to deal with the Board's new standard, and perhaps the standards of other executive agencies, poses a grave risk to small business owners. Larger employers may conclude that they are going to be held responsible for the liabilities of their suppliers, subcontractors, or franchisees. They must exert more control over their day-to-day operations so that they can be more aware of and seek to mitigate these liabilities. Franchisors would become responsible for matters

like who to hire, when to fire, how much to pay. Their administrative costs would skyrocket.

On the other hand, small business owners would be relegated to middle managers, no longer in control of their ultimate business success. These negative effects could cause both sides to reconsider their business relationships altogether. And you do not need to take my word for it. You have already heard from two small business owners this morning who fear those very outcomes.

Members of the Subcommittee, on behalf of the employer community, I respectfully submit to you that the Board's previous joint employer standard worked well for over 30 years. It provided management and labor alike with predictability in terms of who was the employer of any given group of employees, knowledge that is vital to stable bargaining and effective labor relations. The new standard shatters that stability and throws both sides into new and unprecedented territory. Congress should intervene and return the Board's standard to the well-understood rule that existed prior to Browning-Ferris.

Thank you very much for the privilege of testifying here today.

Chairman HARDY. Thank you for your testimony. We will begin our line of questioning. Again, thank you for being here. With that, I will start.

I would like to address Mr. Larkin first. The critical question when it comes to the NLRB is how much control makes you a joint employer? When will business know the answers to the question? In the meantime, what advice have you been giving to your clients?

Mr. LARKIN. Well, the critical question, Mr. Chairman, the answer to that, and part of the problem is that there is no more bright line standard. So I do not know how to answer that question. I have had considerable reflection on that and our clients have had considerable worry about that. The board's new test provides little to no guidance as to what level of retained control, if it is not exercised, will be sufficient to make you a joint employer so it is virtually impossible to predict what level of control is insufficient under the test to make you a joint employer.

Chairman HARDY. Thank you. Mr. Larkin, also, some folks, including Professor Harris, have pointed to the advice memo that the NLRB issued that stated Freshii is not liable as a joint employer as an indicator that the standard is not as broad as the community thinks and the franchise business should not be concerned. Can you elaborate on why the Freshii memo is not comforting to the franchise businesses?

Mr. LARKIN. Yes, sir. As I addressed in my remarks, Labor Board advice memoranda are nonbinding. They do not bind the full National Labor Relations Board, and even in the Freshii case, the General Counsel was free to ignore it if he wanted to, and the full Labor Board would not have had to rely on it. So Board memoranda, advice memoranda do not set Board standard.

As I said, the memo was issued prior to the issuance of Browning-Ferris, so the law on which it relies is now obsolete and replaced by Browning-Ferris. So I do not think it provides any comfort to those in the franchising business.

Chairman HARDY. Thank you.

Mr. Patel, you, in your testimony, indicated that if this rule would have existed when you started, that you might have looked at another business opportunity. Do you think the business climate, other than the one you are doing right now, do you think the business climate is discouraging people to start businesses?

Mr. PATEL. If these same rules were applicable 20, 30 years ago, I do not think I would be in business. I mean, forget looking for a different business. I do not think there is an opportunity to do business in terms of what is out there. If you look at the story that the Asian American Hotel Owners Association, many of the people that came over many years ago, we talk about it amongst the community and say, I do not think we could do what we did 20, 30 year ago today. The regulations that we have, the taxes that are applied to us, I do not think you could do what we did 20, 30 years ago in today's environment.

Chairman HARDY. Thank you. So if franchisors today started asserting their control and authority over your business today, how would that affect your daily operations? And on the other hand, franchisors take away some of that guidance that benefits you. Could you currently provide some information on how that affects you also?

Mr. PATEL. Running a business today is not easy. I mean, dealing with customers, dealing with employees, dealing with a lot of other issues that are out there, just running a day-to-day business is not an easy task. Now you throw in the fact that you have got other regulations, not only the governmental regulations but if a franchisor comes in and says, hey, you have got to do this, the employee has to do this, or whatever regulations or whatever things they put upon us from a franchisee perspective, that is one more thing that we have to worry about. Like I said, today's business is not an easy business to operate. That is one more thing that we have to worry about and we would not want to.

Chairman HARDY. Thank you.

Now turning to Mr. Farrar. SoldierFit has just awarded two franchises given the new joint employer standards, and our decision today—are you having a difficult time with the decision today or are you having a difficult time with how much or how little guidance to provide your franchisee?

Mr. FARRAR. On our end, sir, it is scary. Like I said, the law is very ambiguous. Where am I going to overstep that bounds? At the same time, when that franchisee is coming to us, what are they really purchasing? They are purchasing our mistakes if you want to be honest about it because we are going to help them navigate past the things that we made mistakes on to get to where we are presently much, much faster. But if I am sitting there worried about how much advice or how much training and when and where our company can help with them, then that does give us a moment of pause.

Chairman HARDY. Thank you.

With that being said, with all the challenges that you have gone through, do you think with this decision today, would you have started your operation or franchise the same way today?

Mr. FARRAR. We probably would not have. We have invested already at least $300,000 into this. That is not chump change for a

small business by no stretch of the imagination. If we are sitting down here and all of a sudden we are listed as a joint employer, we get 7 percent on what they do. If we all of a sudden have to up our back office so that we can actually make sure that we have a real finger on the pulse of everything that is happening day to day, that is going to cost us a lot of money and the return investment is not there, so it would not make sense.

Chairman HARDY. Thank you. Thank you for your testimony. My time has expired.

I will yield to Ranking Member Adams.

Ms. ADAMS. Thank you, Mr. Chair.

Mr. Freeman, you mentioned that temporary workers experience a wage penalty compared to their permanent counterparts. Can you explain what a wage penalty is and why it occurs?

Mr. FREEMAN. Certainly. The use of temporary staffing agencies in large and small employers today is often set up to charge the user employer a fee per hour for each temp worker who is deployed to the user-employer's firm to do the basic work of that firm. But the temp worker receives sometimes as little as 60 percent of the fee that is paid to the staffing agency. That is a huge profit that is made simply for the process of deploying a person to do work somewhere else. That is the wage penalty.

The significance of this today is that in wide swaths of manufacturing, logistics, food processing, all or significant parts of the workforce in many facilities. This goes for Nissan plants in Mississippi. It goes for food processing plants in New Bedford, Massachusetts, near where I live. They are temp workers and they are there permanently. No one grows up and wants to say, I want to work for a temp agency for the rest of my life. That is what we are now experiencing. That is the wage penalty. In those situations you have the classic potential for joint employment because it is the user-employer who is setting up the facility, deploying the managers, deploying the supervisors, that is providing direction, both directly and indirectly, for the work that is performed by these temp workers. That is what the joint employer standard is set up to address. So you can bring the people to the bargaining table should workers choose to unionize and have everybody there who is responsible for the work conditions. If they are not at the bargaining table and you make a demand for an increase in the wage, the temp agency can say, well, I cannot give it to you because the wage limit is set by the user employer by contract. That is exactly what happened in the BFI case.

Now, this is a totally different situation than what is facing Mr. Farrar and Mr. Patel. I do not think from what they said that they are joint employers in any way under the Board standard, and I do not think that this changes the modus operandi of their business at all.

Ms. ADAMS. Thank you. Is it not the case that common law agency provides for both direct and indirect control over terms and conditions of employment, and is that not what was decided by the BFI case?

Mr. FREEMAN. Yes. The BFI case, as I said earlier, is neither radical or new. It restates the standard that was established in the Boire v. Greyhound case back in 1965 and is merely a return to a

standard that recognizes that the right to control, and whether that right be exercised directly or indirectly, is part of what constitutes the legal standard for control under the common law agency test. There is nothing exceeding that that is in the Board standard. Retaining that right to control by contract is a critical aspect of what an employer does when they draw up a contract with, for example, a temporary staffing agency.

I see nothing unusual about this, and in situations where you are not in a position to contract to have that kind of control, you are not a joint employer. The problems that I identified here, the problems of low wages in situations where there might be joint employment, these problems were not created by the joint employment doctrine. These problems are created by larger economic forces that the Board is now exercising its authority to try to set up a situation to give workers the opportunity should they so choose to engage in meaningful bargaining to affect terms and conditions that are created by more than one business entity that they work for.

Ms. ADAMS. Okay. Let me ask you, Congress is now considering H.R. 3459, Protecting Local Business Opportunity Act. It has been reported out of the Education and Workforce Committee on a party line vote. The bill would limit a joint employer to only those who have actual direct and immediate control. It is argued that this bill would protect the independence of franchisees as independent business owners. But is it not possible that the bill would actually have the perverse effect of weakening the independence of franchisees?

Mr. FREEMAN. Well, certainly, because what that does, it completely eliminates the possibility of a franchisor ever being a joint employer and taking responsibility for terms and conditions of employment that it is creating through the franchising agreement it has with a franchisee. This is going to free up the franchisor to increase the degree of control it may have over franchisees. I do not think that is what franchisees would want. I think this, as you say, may have a rather perverse effect and may do exactly the opposite of what some of the bill's sponsors intend. I do not think it is a good idea. I think it is much better to have these things adjudicated on a case-by-case, fact-specific basis.

Ms. ADAMS. Thank you, sir. I am out of time. Thank you.

Chairman HARDY. I will now turn the time over to Mr. Kelly for questions for 5 minutes.

Mr. KELLY. I thank the witnesses for being here, and Mr. Farrar and Mr. Larkin, thank you for your service to our country. I generally joke with my JAG officers, though. I do not know if I count that or not being a lawyer myself, Mr. Larkin, but thank you for your service.

Mr. LARKIN. I have heard that before.

Mr. KELLY. Small businesses are so critical to this Nation, and that is why I love being on this Committee. Mr. Farrar and Mr. Patel, I pay attention to you because you have owned small businesses, and unless you have owned a small business, you cannot from the academia world understand what goes on in a small business. But I would venture to say that in your first couple of years in small business, can either of you comment to whether or not you worked at below or at no minimum wage as an owner of a fran-

chise? Either a franchise or a franchisee, can you comment on your earning as the actual owner of that franchise or franchisee?

Mr. PATEL. During my first couple years, me and my wife were on the property 24 hours. So if you divide up the hours and the amount of salary we took in or the profits we took in from the business, we were negative below minimum wage. So, again, I think many small business owners face the same issue in terms of, as far as minimum wage that we really earn, especially with the fact that we put a lot of hours behind that business, whether it be 24—whatever hours we put out there, but it is definitely below what we have there.

Mr. FARRAR. I was homeless, so yes, sir. At the end of the day, if you own a business, that is your passion. You do not just say, hey, I am going to start this, and 5 o'clock it is over. Owning a small business takes a toll, not only on yourself but on your family as well. So I am working 24 hours a day.

Mr. KELLY. They like to talk about the temporary workforce, but can you guys, Mr. Patel and Mr. Farrar, I want a short answer to this, but can you tell me what your most important investment in your company being successful is?

Mr. PATEL. For us, it is human capital. People.

Mr. KELLY. People, right?

Mr. PATEL. I mean, again, a really quick, simply analogy on this is today in the hotel business it is becoming a commodity. You can go to a Holiday Inn, you can go to the Hampton Inn. A room is a room. The breakfast is breakfast. The only way we differentiate our properties to the competition is through our people. We need the ability to manage our employees at our own hotels. That is the only way we can get a competitive advantage compared to the next hotel over.

Mr. KELLY. Mr. Farrar?

Mr. FARRAR. We have a saying in SoldierFit, whose company? It is our company. It is everybody's company. I do not even make the most in my company. The truth of the matter is if you start a business, you are doing it for passion. You are going to take care of the people that help your dream along.

Mr. KELLY. It goes back to my thing, those people, you make sure that they are invested in your company. You are going to pay them as well as you can. Sometimes there are sacrifices, but it comes down to if they are not committed, temps do not give you that same commitment, do they?

Mr. FARRAR. Negative.

Mr. KELLY. Okay. And as a franchisee, Mr. Patel, do you prefer hiring temps or do you prefer hiring people who have an investment in your company who want to see it grow and want to grow with you?

Mr. PATEL. We hire our own people. We actually purchased a hotel a couple years ago in Baltimore and the previous owner had temp people there. After we took it over we just did our own employees. It is just better to manage your own people.

Mr. FARRAR. On our end, sir, we have over 60 employees. We have hired outside of our company nine times. Out of our personal trainers, only two were outside the company. Ninety-eight percent

of our trainers started off as members in our company, then got their certification, and then became trainers.

Mr. KELLY. Finally, I think there was a comment and I do not think that it would apply to you as a franchisee or franchisor, but can you tell me if we do this on a case-by-case basis, how much money you were going to pay to people like Mr. Larkin over there to represent you, and does that make prices go up for the consumer, and also make your wages lower because you have less money to pay the employees that you currently hire because you are defending lawsuits one by one?

Mr. PATEL. Most small businesses like us, we do not have in-house attorneys. We do not have people to do that sort of stuff for us. We are busy running our operations. So for us to hire somebody outside would be a killer.

Mr. KELLY. NLRB, I am sure if you make the wrong decision based on what you think is right and that you had good intentions and you intended to do right, I am sure they do not fine you if you had good intentions and you made a mistake that was honest and truthful that they did not answer. They do not fine you, do they? Absolutely, they fine.

Mr. Chairman, I yield back.

Chairman HARDY. The gentleman yields.

I now turn the time over to Ms. Velázquez, the ranking member on the Small Business Committee.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Freeman, we have heard that the BFI decision is going to significantly impair the franchisor-franchisee business model. What do you have to say about the argument that the BFI joint employer test will impair this business model?

Mr. FREEMAN. Well, the core of my response to that would present a different frame on what the NLRB has said about franchising than is presented by Mr. Larkin. The NLRB has twice made statements in the General Counsel's amicus brief and the BFI case and in the advice memo in Nutritionality, that is very clearly indicated that franchisors are there to protect their brand and to protect the product quality. When they are exercising direct control over aspects of a franchisee enterprise to that end that the Board is not going to pursue any kind of joint employer doctrine to hold the franchisor responsible at all.

Now, it is true that these are advice memos, but the General Counsel ultimately chooses to prosecute. In Nutritionality, the case was dismissed and it never had to go to the Board. Now, there may be some cases, certainly not the kind of case that I hear from Mr. Patel and Mr. Farrar where new levels of technology have created the ability of franchisors to exercise tremendous amounts of control in a franchise enterprise. The Board has a responsibility, when you have new technology changes in the actual industrial landscape of our Nation, to take a look at this and engage in a fact-specific inquiry to see whether there might be a problem. That is going on in the McDonald's case right now, and we will see what happens. But that certainly seems to be a far cry from the situation of many other franchisors. So I am not concerned about overreach here. We have plenty of contractors and subcontractors that have been unionized, that engage in all kinds of business processes that have

never been subject to joint employment over the history of the Board's operation.

Ms. VELAZQUEZ. Thank you.

I think there is universal agreement that union organizing is likely to increase following the BFI decision. How is that going to impact small business contractors and franchisors?

Mr. FREEMAN. Well, we have many small business individuals that are subcontractors and contractors who have unionized workforces. In fact, if you look in the construction industry, we have established a very vital middle class for construction workers through the unionization of major sections of commercial construction. I think it has been a benefit to our Nation. It has been a benefit to the contractors who have greater workforce stability and a much stronger workforce. I think that kind of stability would be a positive thing in a place like the fast food franchises where right now you have workers who are attempting to make a living in a situation that is netting them poverty-level wages and placing a burden upon the taxpayer. So in those situations, we may see unionization.

I also think that we are facing situations in the manufacturing food processing center where you have a lot of temping, where we could radically improve the situation of the workforce and make the business more stable, increase the buying power of the workforce to increase business overall in the United States, and I think that the BFI standard makes that more possible than was the case under the old standard that the Board reversed.

Ms. VELAZQUEZ. Thank you.

Mr. Farrar, I understand your concern about protecting your brand in the franchise agreement. But if a franchisor prescribes rules that could violate the NLRA at the franchisee level, should the parent company be held accountable?

Mr. FARRAR. If I understand your question correctly, you are asking me should we be able to impose these rules and regulations? But again, it goes back to we do not know what the rules and regulations are. It has not been spelled out clearly. We do not know. So you could very easily come up with something and say that we were the ones that we overstepped our bounds, and that is what is scary about it. We do not know how best to help the franchisee. Literally, that is why they purchased the franchise, it is because they wanted some mentorship. We do not know when it is going to be considered that we overstepped our bounds and now we are directly doing anything with them. So it is frightening.

Ms. VELAZQUEZ. Mr. Freeman, do you care to comment on his assertion?

Mr. FREEMAN. I think that we now have some very clear guidance, given the statement in the advice memo and given the General Counsel's statements about franchising, that make it clear what level of control would have to be exercised by a franchisor before there would be even an investigation of joint employment that could go to a hearing. We now have cases that have been dismissed without hearing; that is without the kind of expense of that extensive litigation. So I do not see this as a real problem. I think that when you do have a situation of extensive joint employer control,

all employers in America should be held liable to labor standards as they are to all other legal standards.

I would finally say that as someone who has been involved in adjudicating labor disputes for a long time, we have many aspects of labor law that are situations that involve the application of complex standards to any given fact situation.

Chairman HARDY. Wrap it up as quick as you can. Your time is expired.

Ms. VELÁZQUEZ. Thank you.

Mr. FREEMAN. This is nothing new.

Ms. VELÁZQUEZ. I yield back. Thank you.

Chairman HARDY. I would like to thank you all for being here. I really appreciate it.

Just one comment that I would like to make. I have spent 40 years in the construction industry, know it very well, understand it very well, watched many studies over the years. So with statements like that are made sometimes frustrate a guy like me, because the studies are out there that showed that these union operators, construction workers, have not necessarily benefited the taxpayer. Yes, it has benefited their pockets and the administrations of unions over the years. That is why unions continued to decline. It is actually proven that school projects in Ohio, they actually showed that they had 12 to 15 percent savings when it was gone out to competitive bid versus union mandate-type projects. In Nevada, we have had studies that show the $4.7 billion spent on schools, that we could have probably done another 25 to 35 percent more schools if it had not have gone under the prevailing wage workforce. So is that a savings to the taxpayers?

With that, I would like to give everybody just 2 more minutes to wrap up and make a comment. So I am going to start with Mr. Larkin first, if you do not mind. It will come from the other side. Anything that you missed that you might like to bring forward.

Mr. LARKIN. Sure. A couple of things, specifically, on this franchise question, and the guidance that has come down from the General Counsel in the Freshii memo, the idea that merely protecting your brand and your product quality will not make you a joint employer. Well, who is going to make that decision? The NLRB. And they have told us that they are going to make that decision on a case-by-case basis using a standard that is literally unintelligible. My clients ask me, how much control do I have to exercise before I can be a joint employer? My honest answer to them today is, I do not know. And I do not like giving that advice. But that is the advice that I am giving right now.

The problem with the standard is that its application is in the eye of the beholder and the fact that there has only been one decision, this Browning-Ferris decision and the next big joint employer decision may not come for a while, that is not the end of the inquiry. The real problem, as you have heard today, is the potential chilling effect that this may have on the franchise that never opens, on the employees who are never hired, because someone, whether it is a franchisor, a franchisee, a large general contractor who decides to insource a specialty trade rather than outsource it, whatever the case may be, it is that business owner who makes the decision not to go into business with another business because they

do not want to be the next guinea pig before the Board. That is the problem that I think this standard creates for all of us on the employer side, and that is what we are grappling with.

Chairman HARDY. Thank you.

Mr. Freeman, 2 minutes.

Mr. FREEMAN. Thank you, Chairman Hardy.

I think today we have a situation in the United States where we have seen tremendous prosperity that has been achieved by franchisors and major corporations. We see small business owners squeezed, and we also see it may be hard to run a small business today. I certainly appreciate what these gentlemen are saying to my left. But it is also hard to be a worker today in this economy, especially working in low-wage sectors, and franchising is among them. And in areas of manufacturing and food processing and logistics where temping is widespread, it is hard to be a worker. These workers are not able to make a living wage. When you are working full-time and you are still forced to go to the government to get benefits, we have a social problem of inequality that needs an answer from many different parts of our government and our business community. One of those answers is giving workers a voice, giving them an opportunity to exercise their bargaining power in the labor market, to sit down across the table from those individuals who are setting the terms and conditions of employment and engaging in a conversation to explain what they need to make a living and what they need to do their job correctly.

In that regard, I think that the success of unions in raising the wages and living standards of their members, when unions were large, extended well beyond the unionized workforce and created a higher standard of living for all workers, whether they were unionized or not. The shrinkage of union representation, particularly in a low-wage economy, is hurting all workers, and I think it is also hurting the opportunities that small businesses have to grow and to maintain their workforces.

So I have a somewhat different view of the importance of the National Labor Relations Act and improving the situation and the business climate and the living standards of workers in America.

Chairman HARDY. Thank you for being here.

Mr. Farrar?

Mr. FARRAR. This whole morning we have talked about the benefit to the employees, and the fact of the matter is small business is the largest employer in the United States. When we look at what has happened over the past several years, franchising has outpaced organic startups continuously. If we are going to move forward and make sure that we still have stability in the economy, I want to move forward on something a little bit stronger than I think. I want to know exactly what is the ruling? What is the law? When do I become a joint employer? And when I am not? I appreciate you all's time.

Chairman HARDY. Thank you for being here.

Mr. Patel?

Mr. PATEL. Thank you for inviting us today.

The biggest success factor in our business is people. We talk about franchisor or franchisee and, you know, all the benefits from franchisors. So when they say, well, they do this, they do that, the

franchisor can tell me what kind of soap I can put in my room. It is a tangible item put in, you know, a certain type of soap. It is tangible item to put in X-kind of sheets. It is a tangible items to put in X-kind of doughnuts or for a breakfast item. But when you start dealing with people, it is difficult. You have different people in all different places all over the world, and so dealing with people is very difficult. When the franchisor comes in and has any kind of impact on my ability to manage the people, that makes it hard for us. I feel like my last point would be to say the people is how we want to manage our hotel. That is what makes us different, and so we just cannot have any kind of issues or legislation that impacts my ability to manage my staff members and my hotel.

Chairman HARDY. Thank you. I would like to thank all the witnesses for being here today. I appreciate your attendance and hearing your words of wisdom. Today's hearing has really highlighted the confusion and I think the challenges that these new joint employer standards are creating for a wide variety of small businesses. We are going to continue our work here with our colleagues and continue this Committee to educate the workforce and address these problems.

I ask unanimous consent for the members to have 5 days to submit their statements and the supporting materials for the record.

Any objection?

Without objection, so ordered. This hearing is now adjourned.

[Whereupon, at 11:35 a.m., the Subcommittee was adjourned.]

A P P E N D I X

Testimony of Vinay Patel

President and CEO of Fairbrook Hotels

Before the House Committee on Small Business

Subcommittee on Investigations, Oversight and Regulations

"Risky Business: Effects of New Joint Employer Standards for Small Firms"

March 17, 2016

I. Introduction

Chairman Hardy, Ranking Member Adams, Congressman Knight and Members of the Committee, I would like to thank you for the opportunity to testify before you today and to share with you my experiences as a small business owner, entrepreneur and job creator. I look forward to a constructive discussion about how the new joint employer standard created by the National Labor Relations Board (NLRB) and the permeations of this new regime across various government agencies will dramatically affect my business, my employees and our ability to continue to provide top service in the hospitality industry.

My name is Vinay Patel, I am first generation American and proud small business owner from Herndon, Virginia. I am appearing today not only as a hotelier, but also as volunteer board member of the Asian American Hotel Owners Association (AAHOA). AAHOA represents more than 15,000 small business owners who own over 20,000 properties amounting to nearly 50% of all hotels in the United States. Our members employ more than 600,000 American workers and account for nearly $10 billion in payroll annually.

AAHOA is also a member of the Coalition to Save Local Businesses (CSLB), which is a diverse group of locally owned, independent small businesses, associations and organizations dedicated to protecting all sectors of small business and preserving the traditional joint employer legal standard at the federal and state levels.

My story is like that of thousands of first and second generation Americans and entrepreneurs from all across the country. Over the last three decades, my family and I have spent our careers developing a livelihood as hotel owners and operators. Our company has enjoyed significant growth recently; however, our success is the result of years of sacrifice, hard work and relentless dedication to our family and to our business.

I was born in Malawi, Africa, to parents who emigrated there from India. Entrepreneurship has always been a calling for my family. In Malawi, my father operated a small hardware store before political unrest forced us to leave. In 1980, we came to Greensboro, North Carolina, and lived with family members who were in the hotel business. We learned what we could from them and eventually set out to run our own property. My family settled in Richmond, Virginia, and we not only owned and operated the twenty-seven room Royal Inn Motel, but we also lived at the property. Operating any hotel, even a small one, is a twenty-four hour-a-day business. At that time, my parents, brother and I comprised the entire staff. We served the front desk, cleaned rooms, maintained the property, and accounted for all of the marketing and financial planning. I learned the most important lessons in my life, of hard work, commitment to family and community service, during these formative years. While most kids played sports, or learned music in high school, my brother and I were responsible for running our motel during nights and on weekends.

In 1992, I began college at Virginia Commonwealth University, as a commuting student, so I could continue to help with the family business while I was pursuing my degree. After graduation, we built a second property from the ground up, a fifteen room motel on the other side of Richmond, that we also called the Royal Inn. By then, I was married, and my wife Tina and I were now the sole operators of a new business. For two years, we did nothing but run every aspect of the hotel, from housekeeping, maintenance, guest services and ultimately business planning.

With this tremendous firsthand experience in the lodging business, I decided it was time to take an even greater risk in an effort to grow the company and create a better life for my family. I began to look for opportunities to expand our operations from independent motels, to franchised properties that came with the advantages of a national brand. While my ambitions were high, so too were the hurdles. I found a parcel of land in Stafford, Virginia, and laid plans to build a fifty-five room hotel, with the idea of raising a franchise flag. However, brand after brand turned me down. Most brands will only accept franchisees who have demonstrated a successful and profitable history in the business. My experiences at the Royal Inn were not significant enough for brands to take a chance on me. In some cases, brands would not even come out to the property to see our plans, so we even created a video proposal to show them how we intended to proceed.

After suffering many demoralizing defeats in my attempt to open a franchised hotel, I was fortunate to find the right partner. While I was seeking to open a new property, Country Inn was seeking to expand on the East Coast. We ultimately came to an agreement and I opened the first Country Inn in the Commonwealth of Virginia in 1995. Here too, my wife, kids and I lived on the property and attended to every aspect of the business to save money and to ensure the best customer service. My wife was the head of housekeeping, maintenance and operations and I was the general manager. Two years later, we sold the property and sought additional opportunities to expand the business.

In 1999, we found a larger market and built a Country Inn near Dulles International Airport, and the success of these businesses has allowed us to grow considerably over the past nearly two decades. Our experiences in learning every aspect of the business, from the ground up, provided the discipline to expand at a reasonable pace and to survive the recession, which hit the hospitality industry particularly hard. Now, our company, Fairbook Hotels, owns eleven hotels in Maryland and Virginia, and we work with several franchise brands including Carlson, Hilton, Wyndham and Choice hotels. We are also proud to employ over 150 employees from the local communities.

The single most important aspect of our business is human capital. Our associates are what make us great. We care about our employees and are committed to helping them realize their full potential, knowing that the needs of the company are best met by meeting the needs of our people. We feel that the dedication to our asso-

ciates will bring us loyalty from our guests, our financial stakeholders and the communities in which we live and serve.

It is for this reason the new standard by which to determine employer liability set by the National Labor Relations Board and subsequently adopted by additional administrative agencies is particularly disturbing. I have explained my family's history in the hotel industry in great detail in this testimony to illustrate how incredibly difficult it is for an entrepreneur and an immigrant to succeed as a small businessman. Therefore, I am alarmed by the reckless actions of the NLRB to begin this destructive regime and now the Department of Labor (DOL) to expand upon it. I have no doubt that forging this path to regulate business relationships will dismantle the franchise model, foreclose entrepreneurship opportunities for small businesses and transform franchisees into managers and employees from independent owners and operators.

II. Franchising in the Lodging Industry

Having owned and operated two unbranded properties to start my career, I thoughtfully considered the best opportunities to grow my business. Unquestionably, franchising provided the best business model to expand our operations and in doing so, we have created hundreds of great jobs and invested in the local communities our hotels serve.

Having read the directives by the NLRB and the DOL, I am convinced that the bureaucrats who are creating these mandates have never run a business and clearly do not understand the franchise model. If they had, they would understand it is inconceivable to conflate a franchisee with a franchisor, from any perspective.

As a franchisee, I am responsible to pay a licensing fee and royalties from the top line. In return, I receive the benefits of displaying a nationally recognized sign at my property, take advantage of a wide-reaching marketing campaign and frontline reservations software to ensure efficiencies in running my business and a user-friendly platform for our customers to book rooms.

Most importantly however, I continue to own and operate my own small business. I am responsible for taking all of the financial and career risks involved with starting, maintaining and growing the business. I am responsible to secure financing for the endeavor and the capital to furnish the property. Ultimately, it is my livelihood that is tied to the success or failure of the enterprise, not that of some large corporation.

Moreover, when choosing how best to grow, I embrace competition and will always seek the best deal for my business interests. It is for this reason, I am not beholden to working exclusively with one brand, or one franchisor. I will review the market in which I have interest and study the type of properties most likely to succeed. Subsequently, I will reach out to the particular franchisor to apply for a license. Once we have agreed, we will sign a franchise agreement that outlines our mutual obligations.

As the hotelier, I am solely responsible for the daily operations of the business. My interactions and my staff's interactions with brand representatives are quite infrequent and limited to ensuring the quality standards set for the nationally recognized product remain consistent from one property to the next. In no way does the brand direct the responsibilities or functions of my employees. As their employer, it is my responsibility to establish working conditions including duties, wages, benefits, promotions, discipline and accommodating for workers' needs and personal situations.

I am also proud of my record not only as a successful entrepreneur, but also as a successful job creator and employer. With every hotel we buy or build, we create good American jobs. Not only for those employees who come to work in my hotels, but also in many secondary industries like architecture, interior design and construction.

For those employees who come to work in our hotels, we value building long term relationships and developing successful hospitality professionals. In the lodging industry, competition in ubiquitous. In order to set our properties apart and to create return customers, we must provide exceptional customer service. To accomplish this, we must have associates and employees who are passionate about their work and enjoy working for our company. We take great pride in compensating our workers well and creating an environment in which our employees have every opportunity to advance. There are many examples at our properties where housekeepers have ascended to lead their departments, or desk attendants have become general managers. The lodging industry is unique in its position to create advancement opportunities and provide a platform for workers to develop and enhance their professional skills through varied responsibilities.

The franchise business model is the most effective and efficient vehicle for small business ownership within the lodging industry and in countless other sectors across the country. Changes in this model will undeniably discourage entrepreneurship and create considerable uncertainty between employers and employees across the industry.

III. The New Joint Employer Standard

Under the previous standard of employer liability that existed for more than thirty years, an employer was determined by the control he had over the working conditions of his employees. This standard was simple, clear and certain. Employers and employees came to depend on this understanding to concisely define our relationship.

Under the new standards sought and created by the NLRB, franchisors may be subject to liability based on the actions or inactions of franchisees. As a business owner, I am extremely confident in my ability to run by business; however, as I have experienced throughout my career, franchisors are particularly risk averse and will not simply accept additional liability. Instead, they will likely choose only to work with few, large franchisees and foreclose new

opportunities for small business owners like me, in an effort to mitigate liability from a lesser established business partner. They will also have no choice but to exert control over the daily operations of my businesses under our existing contracts. In doing so, I would cease to be an independent small business owner and I would be subject to the directives of a faceless corporation—ultimately, I would become a de facto employee of the corporate brand.

Worse and most threatening to my business however, is the recent absurd characterization of employer liability from the Department of Labor. In the Wage and Hour Division (WHD) Administrator's Interpretation (AI) No. 2016-1, the DOL discounts the importance of employer status being defined by the direct control over working conditions and instead seeks to create a regime based on an ambiguous standard of "economic realities," that is fabricated on twisted logic and a mangled understanding of reality.

In the AI, the WHD Administrator directly and unabashedly takes aim at the hospitality industry in general and the hotel business specifically. In the first footnote, the AI putatively determines the existence of joint employer status within the hotel businesses simply because employees may wear shirts bearing the name of a national brand. As I explained earlier, the license agreement I sign with a brand permits me to use a brand name as a marketing tool to attract customers to a nationally recognized product or program. Ultimately, I employ my employees and I am the one who signs the front of their paycheck, regardless of what logo is embroidered on an employee's shirt. In my experience, there is no circumstance in which the national brand dictates the tasks performed by my employees—yet the WHD Administrator is keen to grossly oversimplify the nature of my business.

It is critical to understand that, in our company, we have a very positive and collaborative working environment. This means we compensate our employees well and can accommodate for their specific needs. Because of this personal connection, I am in a position to understand an employee's individual circumstances and provide flexibility in compensation, scheduling, responsibilities and opportunities for advancement. I fear this flexibility will disappear if franchisors were forced to take control over the daily operations and staffing decisions became subject to a rigid standardized formula from the corporate headquarters.

The WHD Administrator and AI further denigrate tens of thousands of hardworking small business owners by dismissing all of the efforts necessary to create a business and develop a workforce in designating us as mere "intermediaries" between employees and another corporate entity. This characterization implies hoteliers are already essentially employees of the corporate brand. I assure you, the struggles my family have endured and challenges we have overcome are those of entrepreneurs, business owners and employers—titles we wear with pride.

I also understand that the witch hunt for joint employers does not end at the NLRB, or Department of Labor, but rather there may be a concerted effort by other federal administrative agencies, like the Occupational Safety and Health Administration (OSHA) to

develop liability for franchisors based on health and safety inspections of franchisees. The collusion between agencies to impute legal obligations onto franchisors will only drive a wedge into our industry and create difficulty for me to operate my business.

Frankly, if these burdensome circumstances existed when I entered the business, I likely would have chosen another avenue for entrepreneurship. The intrusion by bureaucrats in Washington, DC, threatens my ability to own and operate my business, to create and maintain good jobs and the stability of the franchise business model across the United States.

For more than thirty years, my family and I have built a successful business as entrepreneurs, and over the course of a few short months, government officials at the NLRB, DOL and OSHA have created a regulatory mechanism to destroy our way of life.

IV. Conclusion

Chairman Hardy, Ranking Member Adams and distinguished members of the Committee, I thank you for the opportunity to speak with you today and for your highlighting this escalating attack on entrepreneurs and small business owners.

The NLRB's new joint employer standard and subsequent cases before the Board have and will undoubtedly affect how independent business owners and operators interact with our employees and business partners. I fear the new standard will create conditions of liability unsustainable for franchisors and they will ultimately take control over the employment decisions and daily operations of franchised businesses.

In an apparent effort to expedite this process, the DOL and other agencies have created a new standard of joint employment based on manufactured jargon, artificial business models and guidelines that lack any semblance of consistency or certainty. These actions undermine the ability for entrepreneurs like me to grow our businesses, create sustainable, local jobs and invest in our communities.

I urge this committee to investigate the motivations behind this coordinated assault on small business and to pass legislation that will reestablish the traditional joint employer standard that has allowed my family and me to realize the American Dream of small business ownership.

Thank you.

Good morning Chairman Hardy, Ranking Member Adams, and distinguished members of the Subcommittee. My name is Danny Farrar, and I am the CEO and Founder of SOLDIERFIT. It is an honor to be in Washington today before you, and I am humbled by your invitation to speak on behalf of the hundreds of small business owners like myself who are members of the Coalition to Save Local Businesses. The CSLB is a diverse group of locally owned, independent businesses, associations and organizations that is devoted to protecting small businesses by restoring the "joint employer" legal standard based on "direct control" in federal labor law. I also am a member of the International Franchise Association, the world's oldest and largest organization representing franchising worldwide. I appreciate the opportunity to tell you my story and explain how the issue before us today will impact small businesses like mine.

When the National Labor Relations Board (NLRB) decided to change the joint employer liability standard in August 2015, it was a scary moment for local business owners like me. For decades, the joint employer standard has protected businesses like mine from liability for employees over which they do not have actual or direct control. That has always made sense. But now, in adopting this new ambiguous *indirect* control standard, the NLRB has made employers potentially liable for employees they do not employ. This new standard jeopardizes countless business partnerships in numerous industries. Any legal doctrine that is based on "indirect" and even unexercised, "reserved" control, such as this one, is so unclear and unpredictable that no one can assure small businesses that their operations are not in violation. That's why I, and so many small business owners around the country, are so concerned. We are being forced to try to grow and operate under such great uncertainty because of this new standard.

So Mr. Chairman, I'm not asking for much today. I'm simply asking this Subcommittee and the Congress to protect local businesses. Specifically, I'm asking to reinstate the very successful joint employer legal standard that the NLRB chose to change in its August 2015 decision in *Browning-Ferris Industries.* The simple, one-sentence legislation contained in H.R. 3459, the Protecting Local Business Opportunity Act, is the solution that can protect small businesses like mine and give us certainty that federal agencies are not going to threaten our businesses in the future. I urge every member to support the bill.

MY SMALL BUSINESS STORY

Mr. Chairman, I am a small business owner and an entrepreneur. By working extremely hard and expending immeasurable time and energy, I founded a successful company that has three locations and we are opening a fourth very soon. But Mr. Chairman, I also am a franchisor; we recently awarded our first two franchises to further grow our concept. And the threat of unlimited, unpredictable joint employer liability is very scary. It threatens everything my partners and colleagues have worked to build in our community.

So while some people may hear the term "franchise" or "franchisor" and think only of major corporations, they can also think of me, my small business, and my story, and the story of hundreds of thousands of both franchisors and franchisees who are small business owners.

Together with my friend and mentor, Dave Posin, I co-founded SOLDIERFIT, a fitness company committed to the ideals of community, patriotism, and the pursuit of the American Dream. In just over 5 years, our company has grown to 3 corporate locations in Maryland, soon to be 4, and we have recently awarded our first 2 franchise locations. I also am the founder and president of Platoon22, a non-profit I started to combat the depression and dislocation that leads 22 veterans a day to take their own lives. I am an eight-year military veteran who served in the U.S. Army, including a combat tour in Iraq, a former firefighter and EMT, and a certified personal trainer with over a decade of experience. As you can see, I've held many positions throughout my life. While today I appear before you as a successful business leader, my road here was long and challenging.

My story begins when I was 2 years old and my great aunt and uncle adopted me. I was different from my adopted family. I had a different personality, and so from a very young age, I was deemed lazy and worthless. The negative experiences of my early childhood would set a tone that plagued me for many years afterwards.

By the time I graduated from high school, where I graduated 146th out of 147 kids, I had very few options for my future. At a time when so many of my peers were beginning their adult lives full of hope for the future, I began a different journey, one that would be plagued with misery, contempt and trauma.

I left for boot camp after graduation and, shortly thereafter, my adoptive mother died of breast cancer. Six months after that, my brother took his own life.

On September 11, 2001, I took the first Army Team into the Pentagon to begin the process of searching for remains. With every step I took, my anger grew. I wanted to be deployed to avenge that day, but my unit was not eligible. I ended up leaving the service.

I took jobs here and there, with one at a fitness club where I met my SOLDIERFIT co-founder, Dave Posin. I ended up getting fired while Dave got promoted to General Manager. With no job, no income, and horrible credit, I ended up homeless. Dave helped me find couches to sleep on so I could survive, so to speak.

With no clear goals for my future, I once again turned to the military. One month later, I was in Iraq, where I completed more than 700 convoy missions. I've been blown up and shot at just about anywhere you can get blown up and shot at in Iraq. Prior to heading overseas, I was full of cracks. Coming home, I was officially a broken man.

The only job I could get upon my return was going door-to-door selling windows. My "colleagues" were all in high school. Imagine

that, returning from Iraq where I led troops in combat to a job high school kids did to earn extra spending money.

I wanted desperately to get out of the pit I was in, but I was scared to try anything for fear of failure, not realizing that every tie I refused to try, my failure was assured. The life I dreamed of seemed so far beyond my grasp. I had no title, no purpose. I wasn't a manager; I wasn't a graduate; I didn't come from money; and I had no family. How on earth could someone like me dig myself out of this hole that had become my life?

I ultimately hit rock bottom. I drank, self-medicated, and ultimately decided my life was not worth living. Somehow I got a second chance. I woke up the morning after I tried to end my life in the psyche ward, and for three days, I was surrounded by people who convinced me that the only way out was to repair my cracks and begin climbing out of the wreckage. With the help of mental health professionals and mentors, I began again.

Today, I lead a company that has been the recipient of the small business of the year awards in Germantown, Frederick, and the State of Maryland. I have been awarded the "Top 40 under 40" of the very important professionals shaping the future of Maryland. I was a top 5 finalist for Men's Health "Ultimate Guy" contest. I have gone from the kid who barely graduated from high school to giving the commencement address at one. I have gone from the young adult who was homeless to owning a business that is slated to make over $3.2 million this year.

Through my non-profit, Platoon 22, I am helping brave service men and women who have charged into combat on behalf of our nation, only to return irreparably scarred—physically, mentally, or both.

The SOLDIERFIT team also is active in the International Franchise Association's VetFran program, which provides career opportunities to veterans and their families to ensure an easier transition back into the civilian economy. Together with a network of over 650 franchise brands, VetFran voluntarily offers financial discounts, mentorship, and training for aspiring veteran franchisees and veterans seeking employment. Under this program, over 238,000 veterans and military spouses have found employment opportunities, including 6,500 veterans who have become franchise business owners since 2011. I am humbled to be part of this network and, more importantly, in a personal position to help the tens of thousands of service men and women returning from overseas deployments, some of whom are as lost as I once was.

SMALL BUSINESS IMPACT

Mr. Chairman, from the perspective of a small business, it appears regulators are attempting a corporate takeover of Main Street by changing the definition of a joint employer. If Washington regulators make large, primary companies liable for the employment and labor actions of third-party vendors, suppliers, franchisees or subcontractors over which they have no direct control, large companies may be compelled to exercise more control

over these small businesses to limit their NLRA liability. Consequently, local business owners may effectively be demoted from entrepreneur to middle manager, as they are gradually forced to forfeit operational control of the stores, clubs, inns or restaurants they built. Not to mention, the enterprise value of thousands of franchises and small businesses may decrease because of the decreased operational control. Further, large companies may be forced to bring services in house rather than hiring a small business to do the work. Joint employer means big companies will get bigger, and small businesses may run out of business partners and ultimately fade away.

A leading firm that conducts research on franchise businesses, FRANdata, released in November 2015 a survey report entitled "FRANdata Key Findings and Survey Results: 2015 National Labor Relations Board Joint-Employer Ruling." FRANdata surveyed industry leaders and stakeholders, conducted secondary research, and examined franchise company filings to assess the potential negative impact of the NLRB ruling on franchise businesses and indirectly on the economy.

Among the most significant findings of the report are:

- An estimated 40,000 franchise businesses, affecting more than 75,000 locations, are at risk of failure because of the joint-employer ruling, which will increase labor and operating costs beyond operating margins.
- As a result of business failures, downsizing, and a decline in the rate of new franchise business formation, more than 600,000 jobs may be lost or not created.
- The equity value of franchise businesses is expected to drop by a third to a half. Rising costs will have a negative multiplier effect on valuations. Potentially, hundreds of thousands of franchise business owners will see the equity they have built in their businesses over years decline as the advantages of the franchise model are stripped away, causing higher operating costs.[1]

As frightening as those statistics are, the NLRB is not the only agency trying to expand joint employer liability over more small businesses. On January 20, the Wage and Hour Division (WHD) released a 16-page administrative interpretation (AI) on joint employment, and it seems to provide an even broader interpretation of joint employment under the Fair Labor Standards Act than even the NLRB's definition in its *Browning-Ferris* decision.

In addition to the joint employer concerns, many local business owners are nervous about their future access to capital and the implications of joint employer on other agencies. The members of this Subcommittee well know that the Small Business Administration's loan guarantee program is critical to the creation and growth of small businesses, as it was to SOLDIERFIT. Our business award came from the SBA, and our first franchisee secured his initial loan from SBA as well. So I want to emphasize how important it is that

[1] Crews, A. et al. FRANdata Key Findings and Survey Results: 2015 National Labor Relations Board Joint-Employer Ruling (2015). FRANdata.

the SBA implement changes to the loan approval process that streamline and facilitate franchise businesses' access to these loans. But, any changes to the standards cannot be viewed in a vacuum. It is important to consider these changes in light of other federal government agencies revisions to the definition of a joint employer and the increased scrutiny on franchise businesses to ensure there are no unintended consequences that would reduce access to capital.

The worst case would be if the SBA streamlining proposal were to be hijacked by the anti-franchise-model forces in other agencies. If the SBA regulation meant to accelerate small businesses access to capital becomes instead a hammer wielded by zealots in other agencies determined to crush the franchise model, they would view the destruction as inconvenient but necessary collateral damage, but it would be a disaster for small business owners.

Why are our local, small businesses being unfairly targeted by numerous federal agencies? Why don't we have a government that supports small business, rather than making it immeasurably more difficult to create jobs and serve our communities? I don't see or experience the so-called "cracks" in our model that some officials here in Washington claim to be trying to repair. From where I sit, small business like mine still employ 50-60 percent of the workforce and demonstrate immeasurable support for every community in America. We are proving that small business will continue to chart the course for success in this country. Mr. Chairman, one of the most important lessons I can share from my life experiences is this: When we refuse to fight, our failure is assured. I've seen what can happen when we refuse to stand up and fight for ourselves. That's why I'm here today. To fight for my dream and the dreams of thousands of small business owners throughout the United States who are truly confused about why our government is implementing regulations that will assuredly chip away at our American Dream. Our Coalition is looking for members of Congress to stand up with us.

CLOSING

Mr. Chairman, I hope that through my story and the testimony of my fellow witnesses, you will gain a deeper understanding of the very long roads many of us have walked before realizing the dreams we are living today, and the reasons why our coalition of Main Street small businesses is asking Congress for help.

The bottom line, Mr. Chairman, is this—no one can assure me that my business—or anyone else's business—may not run afoul of the NLRB's vague joint employer liability standard based on "indirect" and even unexercised, "reserved" control. That's why I and so many small business owners around the country are asking for Congress to fight for locally owned businesses like mine, and exercise its Article I power to provide a check on an overreach by a federal agency like the NLRB's joint employer activism.

Mr. Chairman, thank you for your leadership on this issue, and thank you again for allowing me the honor of addressing you today. I would be happy to answer any questions you have. God bless.

HOUSE COMMITTEE ON SMALL BUSINESS

SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT, AND REGULATIONS

Hearing: Risky Business: Effects of New Joint Employer Standards for Small Firms

Testimony of Professor Harris Freeman

Western New England University School of Law

March 17, 2016

I would like to thank the Chairman of the subcommittee, Congressman Cresent Hardy, ranking member, Congressman Alma Adams, and the other members of the subcommittee for this opportunity. My testimony will address two points regarding the National Labor Relations Board's (NLRB) joint-employer rule announced in *Browning-Ferris Industries of California*[1] *(BFI).* First, the *BFI* decision is a proper exercise of the Board's statutory authority and its consistent with Supreme Court precedent. Second, the Board's return to a more inclusive joint-employer standard will do no harm to America's small businesses even as it provides a path to meaningful collective bargaining for a significant sector of the low-wage work force that has been excluded from the protections of federal labor law.

The viewpoint I offer today rests on my profound respect for the labor rights and procedures embodied in the National Labor Relations Act, which I acquired over the course of fifteen years teaching labor law and researching the workplace rights of contingent workers. My view of the Board's modification of its own legal standard is also informed by my experience adjudicating labor law disputes during the six-plus years I served on the Commonwealth Employment Relations Board in Massachusetts. In this capacity, my decision making process was often guided by well-regarded NLRB precedent, policy, and the Board's sound methods of adapting labor law standards to the evolving realities of the modern workplace.

The NLRB's Joint Employer Standard in Context

The NLRB's reexamination of the joint employer doctrine in *BFI* was an appropriate response to the rapid expansion of subcontracting and precarious low-wage work. Over the course of the 21st century, this trend has irreversibly fissured and restructured the American workplace. The extensive subcontracting of core business functions now has deep roots in low-wage sectors of our economy due to the widespread use of temporary staffing services and the expansion of franchising relationships.

[1] 362 NLRB No. 186 (2015).

I begin my remarks focusing on the 'industrial realities' of temping and franchising arrangements. It is widely recognized that these ubiquitous forms of business organization are impacted by the NLRB's *BFI* ruling. Temping and franchising accounted for a disproportionate share of the economic growth following the Great Recession of 2008. By 2013, staffing services generated $109 billion in sales and 2.8 million temp positions—a full 2.0 percent of total jobs. Profits are also high; consider that in the first quarter of 2014, True Blue (formerly Labor Ready), the largest U.S. staffing agency, reported profits of $120 million on gross revenues of $453 million. Franchising is equally profitable. The ten largest fast-food franchises employed over 2.25 million workers and earned more than $7.4 billion in 2012. Shareholders earned another $7.7 billion in buybacks and dividends. This trend should be of particular concern to members of the Congressional Small Business Committee because soaring profits and substantial job growth in franchising and temporary staffing services have advanced hand in glove with poverty-level wages, extraordinarily high rates of wage theft and widespread health and safety violations in these sectors.

Widely reported problems associated with low-wage temp work have eroded the wages, benefits and conditions of work in logistics, manufacturing, recycling and food processing.[2] Compared to direct hires, temp workers experience a wage penalty. This is most severe among blue-collar temps who now comprise 42 percent of the temporary staffing workforce. For example, in metro Chicago, a class of permanent, long-term temp workers load and unload goods at the warehouses that service WalMart and other big box stores. These perma-temps comprise over two-thirds of the 150,000 strong warehouse workforce. Their pay averages $9 per hour—$3.48 less than direct hires. Almost two-thirds of these workers fall below the federal poverty line. A well-documented, national epidemic of wage theft by unscrupulous staffing agencies only makes matters worse. Further, OSHA complaints and protests by temp workers have unearthed major health and safety issues, causing OSHA to establish a Temporary Worker Initiative to determine, in part, when to hold staffing agencies and client employers jointly liable for violations that impact the temporary workforce.

The workplace ills associated with franchising is exemplified by the challenges facing the 3.8 million workers who are employed in the fast-food sector. More than 75 percent of them work in franchised outlets and routinely face under-employment, poverty-inducing earnings and wage theft. Households that include a fast-food worker are four times as likely to live below the federal poverty level. The social costs of these conditions are borne by U.S. taxpayers, who shell out about $3.8 billion per year to subsidize public benefits received by fast-food workers employed at the top-ten fast-food franchises who must supplement poverty-level wages with assistance from government welfare programs.

Workers are not the only ones impacted by the systemic production of inequality and poverty that is associated with many fran-

[2] *See, e.g.,* Michael Grabell, *Temp Land: Working in the New Economy,* PRO PUBLICA, https://www.propublica.org/series/temp-land (last visited March 15, 2016)

chising arrangements. Individual franchise owners also face high levels of economic uncertainty and like franchise workers, they are being squeezed by the big franchisors. The non-negotiable terms of franchise agreements dictate extensive franchisor control over day-to-day operations while placing most of business risk on the franchisee. These agreements routinely require franchisees to pay exorbitant fees for the right to operate, which not only places a downward pressure on wages, but leads to higher failure rates for franchised small business owners.[3]

The BFI Decision is a Return to the Traditional Joint Employer Test Endorsed by the Supreme Court

The *BFI* decision did not radically reinterpret Board precedent and it did not resurrect a dormant, outmoded legal test. The Board merely returned to the traditional joint employment standard endorsed by the U.S. Supreme Court more than fifty years ago.[4] *BFI* maintains the basic inquiry long used to determine whether a putative joint employer "possesses sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]."[5] Under the *BFI* decision the Board reaffirmed that a finding joint-employment is made only when a case-specific factual analysis shows that two employers "share or co-determine" the essential terms and conditions of employment.

What the NLRB did do in *BFI* is close a longstanding loophole in the joint employer test. Relying on the joint employer test endorsed by the Supreme Court in *Boire v. Greyhound Corporation*[6] and the influential reasoning of the Third Circuit Court of Appeals' decision, *NLRB v. Browning-Ferris Industries of Pennsylvania,*[7] the Board found that joint employment rests on a broader approach to the concept of control than is found in later Board rulings beginning in 1984.[8] Under this broader framework, the Board can once again examine the full range of common law agency factors that can reveal whether and how an employer actually exercises legal control over the essential terms and conditions of employment. The Board no longer limits its inquiry to examining whether employer controls are exercised "directly and immediately." Instead, it will now use the traditional, multifactor common law inquiry to determine whether an employer "affects the means or manner of employees' work and terms of employment, either directly or through an intermediary."[9]

This Board implemented this approach in the *BFI* case and found that the user employer maintained legal control over the 240 long-term temps at its recycling facility through a host of direct and intermediated factors, all of which decisively affected the means and manner of the employees' work and terms of employment. The user employer was found to have issued "precise directives"

[3] *See* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 STAN. L. REV. 927, 933-34 (1990); Catherine Rucklehaus, et al., *Who's the Boss: Restoring Accountability in Outsourced Work* (NELP May 2014).
[4] *Boire v. Greyhound Corp.,* 376 U.S. 473 (1964).
[5] *Id. at 481.*
[6] *Boire,* 376 U.S. 473.
[7] 691 F.2 1117 (3rd Cir. 1982).
[8] *Browning-Ferris Industries,* 362 NLRB No. 186, slip op. at *16-18.
[9] *Id.,* slip op. at *21.

through staffing agency supervisors to communicate when a worker should be dismissed, where workers should be deployed, and the pace at which the work should be completed.[10]

The staffing agreement between BFI and the Leadpoint staffing agency was also found to establish BFI's control over the workforce. The agreement gave BFI final say over who the staffing firm could hire to work at BFI's facility, how much the staffing agency could pay the workforce, and the right of BFI to override Leadpoint supervisors' directives to the workforce.[11] The Board majority's robust, fact-based inquiry into the employment relationship at BFI's facility contrasts sharply with the limited factual assessment of the employment relationship urged by the two dissenting Board members.[12]

The *BFI* decision does not specifically address or apply the joint employer test to franchising arrangements. That factual determination is currently underway as part of an unfair labor practices complaint alleging that McDonalds Corporation, one of the nation's largest franchisors, is a joint employer along with a number of its franchise outlets.[13] I am not in a position to second-guess the outcome of this fact-intensive inquiry.

However, this much is clear: Over the course of the last decade, tightly controlled business format franchisee arrangements have expanded significantly to ensure that major franchisors can maintain uniformity of brand, product and operations essential to their business models. These business format agreements permit franchisor control over franchisee workers' terms and conditions of employment. Franchisor control can be exercised through training, operating manuals, and regular communications with franchisees.[14] Franchisors in the fast-food industry have also implemented sophisticated computer-driven management systems to ensure brand maintenance and protection, creating yet another mechanism for franchisor control over worker' terms and conditions of employment.

These systems and the terms of franchise agreements, often enforced through unannounced, on-site visits by franchisor representatives, allow franchisors to control the number of workers required to do the job, the manner and speed of the performance of every work task, the equipment and supplies used on the job, the manner in which equipment is used, as well as employee grooming and uniform standards. Every one of these control mechanisms dictated by the franchisor may affect the essential terms and conditions of employment.

The NLRB's BFI Decision Presents a Workable Joint Employment Test That Does Not Create Uncertainty for Small Business

---

[10] *Id.*

[11] *Browning-Ferris Industries,* 362 NLRB No. 186, slip op. at *24

[12] *Id.,* slip op. at *25 (Dissent of Members Miscimarra and Johnson).

[13] *McDonald's USA, LLC, a Joint Employer, et al.,* 02-CA-093893, et al.; 363 NLRB No. 92 (New York, NY, January 8, 2016) (consolidating 13 complaints and 78 charges against McDonald's USA, LLC).

[14] *See* Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 STAN. L. REV. 927, 933-34 (1990).

In the context of the economic realities of twenty-first century subcontracting that I have outlined, the *BFI* joint employer standard does not present an unworkable test and it should not be a source of legal uncertainty or anxiety for the small business community. The BFI ruling and other advice provided by the NLRB provide ample, clear guidance for small business owners, their human resource officers and legal counsel. In fact, as recently as April of last year, the NLRB's Office of the General Counsel issued a detailed ten-page advice memorandum that applied the BFI joint employer test in case involving a major fast-food franchisor in Chicago.[15]

The General Counsel's advice memorandum explained that the franchisor, Nutritionality, Inc., did exercise extensive control over its franchisee's operations to ensure standardized products and customer experience. However, the General Counsel found that the controls Nutritionality exercised through its franchise agreement and directives it issued related to the image that the franchisor wished to convey and did not extend to any control over the terms and conditions of the employees at the franchisee's restaurant.[16] The memorandum concluded that the franchisor, Nutritionality, Inc. was not a joint-employer and therefore not liable for unfair labor practices allegedly committed by its affiliate. The NLRB's advice memorandum makes it clear that the Board's joint employment test does not predetermine the outcome of any fact-intensive, case-by-case inquiry into joint employment.

It should also be noted that the *BFI* joint employer standard has not in any way altered the status of small business owners that operate a sizeable portion of franchises. These franchisee owners have the same employer status under the *BFI* joint employer standard as they did under the Board's previous test. What has changed is that the burden of responsibility for the terms and conditions of franchise employees can be equally shouldered by franchisors when they are deemed joint employers. A finding joint employer status in a franchising arrangement might actually prove beneficial to franchisee owners. Joint employment would bring the franchisor to the bargaining table along with the franchisee. This would place the soaring profits being made at the top of the franchise chain on the table as a source of wage hikes for the underpaid franchise workforce. This could very well provide relief for beleaguered franchise owners whose small business is forced to operate with costly levels of workforce turnover[17] and under razor thin margins imposed by the franchisor business model.

With regard to temping: the BFI decision does not present any uncertainty for large or small employers that use a temporary staffing agency workforce to perform the essential work of their

[15] Advice Memorandum from Barry J. Kearney, Assoc. Gen Counsel, Div. of Advice, Office of the Gen. Counsel NLRB to Peter Sung Ohr, Reg. Dir., Region 13 (April 28, 2015), https://www.nlrb.gov/cases-decisions/advice-memos.

[16] *Id.*

[17] High turnover rates hurt low-wage companies in general, costing employers $4,700 each time a worker leaves and is replaced in the high-turnover sector. Robert Pollin & Jeannette Wicks-Lim, *A Fifteen Dollar Minimum Wage: How Fast Food Industry Could Adjust Without Shedding Jobs,* Political Economy Research Institute Working Paper, No. 373 (Jan. 2015), http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_351-400/WP373.pdf.

business. In these situations, the NLRB has made it clear that that a user employer who contracts with a temporary staffing agency is potentially a joint employer of the temp workers that are deployed to the user firm's place of work. The potential for a finding of joint employment is built into the structure of temporary staffing arrangements and contractual agreements. Unlike franchising, the temporary staffing industry business model is based on codetermination of the terms and conditions of employment. Typically, the user firm contracts with the staffing agency and retains extensive direct and indirect control over the means and manner by which the work is carried out in its own facility. The temporary staffing agency earns a substantial profit for handling all payroll issues, providing worker's compensation insurance and coordinating the hiring of the workforce. BFI makes it clear that even when the temporary staffing agency deploys supervisors to the user employer's worksite along with the temp workers, the staffing agency supervisors are obliged to follow the directives issued by the user firm's managerial and supervisory staff.[18]

Over the last few years, we have witnessed large numbers of under-employed, low-wage temporary workers and franchised fast-food workers demand their fundamental labor rights. The NLRB's joint employment test now allows for these workers to enter into meaningful collective bargaining relationships in workplaces where temporary staffing arrangements and franchising result in two employers sharing or codetermining the conditions of work. It would be virtually impossible for the temporary workforce at BFI to meaningfully bargain over a wage increase or to discuss a safety issue when BFI is not at the bargaining table to address these mandatory subjects of bargaining. Similarly, there can be no meaningful collective bargaining when a franchisor exercises palpable, albeit indirect control, over workplace conditions that are at the core of the obligation to engage in good faith bargaining if that employer is not legally obligated to sit at the bargaining table with workers that choose to unionize.

Conclusion

Given the NLRB's obligation to apply labor law to changing economic realities,[19] the Board acted well within the authority granted to it by Congress when it revised its joint employer standard in *BFI*. Nothing in the statutory text of the NLRA or in well-reasoned precedent prevents the Board from returning to the traditional joint employer test that predominated until 1980, when a rigid and narrower conception of joint-employment gained sway in Board proceedings. It is my view that the Board's revival of the traditional, joint-employer standard is necessary to achieve both the flexibility employers seek and the fair treatment and decent wages that temps and franchise workers demand and deserve. Absent the NLRB's revised joint employment test, our nation runs the risk of

[18] *Browning-Ferris Industries,* 362 NLRB No. 186, slip op. at *22-24; *See also* Harris Freeman & George Gonos, *Taming the Employment Sharks: the Case for Regulating Profit-Driven Labor Market Intermediaries in High Velocity Labor Markets,* 13 EMPL. RTS. & EMPLOY. POL'Y J. 285 (2009).

[19] *See NLRB v. Weingarten,* 420 U.S. 251, 266 (1975).

labor law becoming irrelevant in the much of the low-wage economy, where collective bargaining is sorely needed to address the extreme levels of inequality and exploitation currently experienced by millions of American workers.

Thank you for considering my comments.

Written Testimony of Kurt G. Larkin[1]
Hunton & Williams LLP

Before the U.S. House of Representatives Committee on Small Business, Subcommittee on Investigations, Oversight and Regulations

March 17, 2016

"Risky Business: Effects of New Joint Employer Standards for Small Firms"

I. INTRODUCTION AND EXECUTIVE SUMMARY

On August 27, 2015, the National Labor Relations Board ("Board" or "NLRB") announced a controversial new legal standard for determining if a business is the "joint employer" of individuals employed by another business. The decision, *Browning-Ferris Industries, Inc.* ("*BFI*") departed from decades of established precedent and established a test of sweeping scope that could eventually redefine the employer-employee relationship across all areas of business and industry in the United States.[2]

The *BFI* majority premised its decision on a claimed need to return the Board's joint-employer standard to the state in which it existed before the Board supposedly narrowed the test in recent decades. The history of the Board's joint-employer precedent suggests this premise is inaccurate at best, and misleading at worst. The new standard promises to go *much* further in practice than prior Board precedent by dramatically increasing the number of entities who will face joint-employer liability.

Under the new standard, the Board will consider two or more businesses to be joint employers if: (1) both entities are employers under the common law; and (2) both employers share or codetermine those matters governing the "essential terms and conditions of employment." This standard, on its face, is essentially a restatement of earlier Board precedent. However, *BFI* goes much further:

> We will no longer require that a joint employer not only *possess* the authority to control employee's terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.[3]

---

[1] Mr. Larkin is a partner in the Labor & Employment group of Hunton & Williams LLP, where he represents employers in many industries in labor-management relations and other employment matters. The firm has more than 700 lawyers located in 19 offices across the United States, Europe and Asia. Mr. Larkin is a member of the ABA Section of Labor and Employment Law's Committee on Development of the Law Under the NLRA. The statements and opinions in this testimony are Mr. Larkin's personal views and do not reflect those of Hunton & Williams or its clients, although he wishes to thank Hunton & Williams associate Mary C. Miller for her assistance in helping to prepare this statement.

[2] 362 NLRB 186, slip op. (August 27, 2015).

[3] *Id.*, at 2.

In other words: (i) a company's retention of an unexercised right to control another company's employees, or (ii) a company's exercise of mere indirect control on the employment terms of those employees, are now both relevant and potentially dispositive of joint-employer status. This leads to an obvious question: if a putative joint employer never actually exercises direct control over the employees of another company, how much retained or indirect control will be sufficient to establish joint-employer status?

The murky guidance provided by the Board's majority opinion makes this question virtually impossible to answer. And the stakes are high: the consequences of a finding that a business and its subcontractor are joint employers could be significant, including: (i) a requirement that the customer participate in collective bargaining with the union that represents (or seeks to represent) the subcontractor's employees; (ii) a finding that picketing directed at the customer is no longer illegal secondary activity under federal labor law; (iii) shared liability for unfair labor practices committed against the subcontractor's employees; and (iv) potential limitation of the customer's business flexibility.

All of these risks are now likewise inherent in the dealings between franchisor and franchisee; temporary staffing agency and end-user of temporary labor; general contractor and subcontractors, and perhaps even parent and subsidiary, particularly in the case of private equity. The test articulated in *BFI* is wide enough to encompass these relationships, many of which have never before been subjected to joint-employer liability under the Act.

Those on the side of the Board majority claim the new joint-employer test is a good thing, and that it is designed to combat the practice of "unscrupulous" employers who take advantage of the growing contingent workforce. But the Board's new test includes no exception for the "scrupulous" employer – whatever that might mean. It sweeps with a broad brush across all industries and virtually all types of business relationships, ensnaring arrangements that are perfectly legal and in fact vital to the growth and success of small business in this country.

Ultimately, the uncertainty over how to deal with the Board's new standard poses a grave risk to small business owners. Some employers may conclude that if they are going to be held responsible for the liabilities of their suppliers, subcontractors or franchisees, they must exert more control over their day-to-day operations so that they can be more aware of, and seek to mitigate, these liabilities. Franchisors would become responsible for matters like who to hire, when to fire, and how much to pay. Their administrative costs would skyrocket. On the other hand, the small business owner franchisee would be relegated to a middle manager, no longer in control of their ultimate business success. Such effects could cause both sides to reconsider their participation in franchising altogether.

Other employers may decide to avoid joint-employer liability by reducing their level of control over business partners. The potential unintended consequences of this course are too numerous to list, but at a minimum would include: an increase in incidents of workplace violence and harassment, if the putative employer relinquishes a say in who can work on its jobsite; an increase in on-the-job accidents, if the putative employer decides to no longer require subcontractors to comply with its own safety rules, or refuses to supply them with safety equipment; and a degrading of the integrity of a franchised brand, if the franchisor/putative employer decreases or discontinues its oversight over matters such as product line and preparation, customer experience and satisfaction, and store or property appearance. None of these outcomes would be beneficial to American business.

Ironically, the Board may wind up discouraging the very behaviors it claims its new policy is intended to foster in labor-management relations. Unions, human rights groups and others in the employment community have challenged companies to implement responsible contractor policies and codes of conduct not only for their own employees, but for those of their suppliers and business partners. Browning-Ferris discourages employers from doing just that. If, for example, a general contractor were to require that its subcontractors pay a living wage, comply with federal anti-discrimination and overtime regulations, or implement minimum safety procedures, it may be sealing its status as a joint employer under the Board's new standard.

The Board's previous joint-employer standard worked well for over thirty years. It provided management and labor alike with predictability in terms of who is the employer of any given group of employees, knowledge that is vital to stable collective bargaining and effective labor relations. The new standard shatters that stability and throws both sides into new and unprecedented territory. Congress should intervene and return the standard to the well-understood rule that existed prior to *BFI*.

II ANALYSIS

A. The National Labor Relations Act (and The Common Law) Limits The Board's Authority to Define Who is an "Employer" and Who is an "Employee"

The history underlying passage of the Taft-Hartley amendments to the National Labor Relations Act (the "Act") make clear that Congress has restricted the Board to well-established principles of common law agency in determining who is an employer and who is an employee under the Act, and that those principles do not support the Board's sweeping decision in *BFI*. Prior to Taft-Hartley, the U.S. Supreme Court had held that the Act's definition of "employee" should include independent contractors. The Court based this holding on the belief that anyone having an "economic relationship" with a firm should be deemed its "employee," and that the employment relationship should be determined based on "economic facts rather than technically and exclusively by previously established legal classifications."[4]

In response to the Supreme Court's decision in *Hearst*, Congress amended the Act to expressly exclude "independent contractors" from the definition of "employee."[5] Congress also revised the definition of "employer," limiting the definition to those who are "acting as an *agent* of an employer."[6] Taft-Hartley's legislative history illustrates that Congress' intention in making these changes was to limit the employer-employee concept to instances in which the putative employer exercised some direct form of control over the putative employee:

> [The concept of "employee"], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board,

[4] *NLRB v. Hearst Publications*, 322 U.S. 111, 128-28 (1944).

[5] 29 U.S.C. §152(3).

[6] 29 U.S.C. §152(2) (emphasis supplied).

means someone who works for another for hire . . . [and who] work for wages or salaries under *direct supervision*.[7]

Thus, Taft-Hartley reflects Congress' rejection of more expansive and policy-based notions like the "economic realities" philosophy in favor of the principles of common-law agency. Those principles have long been recognized by the courts as requiring much more than the indirect or retained but unexercised control espoused by the majority in *BFI*. For instance, the Supreme Court has held for over 100 years that "under the common law loaned-servant doctrine *immediate control and supervision* is critical in determining for whom the servants are performing services."[8] More recently judicial decisions have repeatedly emphasized that the common law test for employer status requires evidence of direct and immediate control.[9]

The lesson to be drawn from this history is simple: (1) the Board must use traditional common law principles when deciding who is an "employer" and who is an "employee" under the Act, and (2) those principles have always been understood by interpreting courts as requiring more than mere indirect, or reserved but unexercised, control by the putative employer over the day-to-day work of the putative employees.

B. The Board's Prior Joint-Employer Standard Was Consistent With The Common Law Concepts Enshrined in The Act

Understanding the history of the Taft-Hartley amendments and the manner in which courts have long applied common law agency principles undermines the *BFI* majority's claim that its newly announced test is a "return" to the common law standard supposedly abandoned by more recent Board precedent. The *BFI* majority traces the "core" of the Board's joint-employer jurisprudence to a 1965 decision, *Greyhound Corp.*[10] Ironically, the standard applied in that case, although not clearly articulated, was consistent with the common law and with the Board's more recent joint-employer precedent.

---

[7] H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)(emphasis supplied); *see also id.* at 11 (revised definition of "employer" "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and unions"); and *id.* at 68 ("before the employer can be held responsible for a wrong . . . the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

[8] *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

[9] *See, e.g., Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(because Copyright Act of 1976 does not define "employer" or "employee," Court must look to common law to determine whether work of artist hired by petitioner was "work for hire" under statute; common law focuses on "the hiring party's right to control the manner and means by which the product is accomplished"); *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006)(interpreting *Reid* in Title VII case as "countenanc[ing] a relationship where the level of control is *direct, obvious and concrete, not merely indirect or abstract*")(emphasis supplied); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009)(Wal-Mart not joint employer of the employees of its suppliers where it had no right to "*immediate level* of day-to-day control")(emphasis supplied); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014)(franchisor not liable for franchisee's harassment of its employee under California Fair Employment and Housing Act, because traditional agency principles "require[] a *comprehensive and immediate level of day-to-day authority* over matters such as hiring, firing, direction, supervision, and discipline of the employee")(emphasis supplied).

[10] 153 NLRB 1488 (1965).

In *Greyhound Corp.*, the Board considered whether Greyhound was a joint employer of janitors and maids provided by an outside maintenance company. The Board found joint-employer status because Greyhound and the maintenance company "share[d], or codetermine[d], those matters governing essential terms and conditions of employment" and because Greyhound "possessed sufficient control over the work of the employees" to qualify as a joint employer.[11] Specifically, the Board found it probative that Greyhound provided the janitors with detailed daily and weekly instructions, set their pay rates and retained the right to recapture profits if employees were hired below these rates, and mandated the maintenance company follow all of its "suggestions." Thus, the evidence established that Greyhound directly controlled the wages earned by the maintenance company's employees.

In the years following the *Greyhound* decision, the Board continued to utilize, more or less, the "share or codetermine" rationale for determining joint-employer status. While these decisions were not always clear in terms of the precise legal test employed, the underlying facts and the Board's interpretation of those facts reflect that it would typically require – even in the cases the *BFI* majority cites as support for its new standard – that to be probative of joint-employer status, reserved control must be virtually absolute, and exercised control must be meaningful, and not merely indirect or tangential.

1. The Board Would Not Find Joint-Employer Status Based on Retained Control Over Routine or Minor Matters

In *Mobil Oil Corp.*, the Board looked to the parties' actual practice in finding an oil platform operator the joint employer of workers supplied by a contractor.[12] The Board considered the fact that the contractor's lead men were merely "conduits" between the operator and the laborers, and the contractors could not give their laborers any direction without "being given the say-so" of the operator. The operator often bypassed the lead men altogether and gave direct work instruction to the contract laborers. The operator also: regularly interviewed potential laborers and made hiring decisions; determined the classifications of those hired; prepared and posted work schedules; authorized overtime; approved promotions and vacations, and verified time slips. In view of the operator's actual exercise of direct control over its contract laborers, the Board found joint-employer status.

In *Ref-Chem Co.*, the Board found that a company engaged in the manufacture, sale, and distribution of petrochemical products was the joint employer of insulation maintenance service technicians supplied by a corporate contractor.[13] Record evidence established the manufacturing company had a practice of approving prospective maintenance service technicians' applications, determining the number of employees needed, and deciding who (if anyone) would be permitted to work overtime. In addition, the manufacturing company maintained "virtually complete control" over the maintenance service technicians as reflected in the day-to-day operations. In fact, the contractor had no authority to exercise discretion in the manner its employees' work was carried out under the contract. All work was performed on the manufacturing company's premises with its own equipment and machinery, and the maintenance service technicians'

[11] *Id.*

[12] 219 NLRB 511 (1975). Interestingly, the Board claimed it "did not know" whether the operator was the joint employer of a different group of employees because "no evidence was introduced regarding the manner in which [this other services contract] was actually implemented."

[13] 169 NLRB 376 (1968).

supervisor could not undertake any project without receiving a work order and specifications from the manufacturing company's central maintenance. The Board also found it probative that the manufacturing company owned nearly 50% of the contracting company's stock. As a result of these close financial ties and the "complete control" *exercised* by the manufacturing company, the NLRB found joint-employer status.

In another post-*Greyhound* case, *Harvey Aluminum, Inc.*, the Board determined that a plant owner was the joint employer of the employees of the plant operator.[14] The plant owner retained (and seemingly utilized) sufficient control over virtually every element of operation. In addition, it was the sole business of the plant operator to operate the plant in question, meaning that the operating company's only obligation was to service and satisfy the plant owner.

In other instances, the Board considered the potential "power" of retained control by the putative joint employer. For example, in *Jewel Tea Co., Inc.*, the Board determined that a corporate licensor was the joint employer of all individuals employed at various departments in two retail stores—some of which were operated by the licensor and some of which were operated by separate employers under a license agreement.[15] The Board noted that the fact that "the licensor has not [necessarily] exercised such power [retained in a contract] is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control." However, the licensor retained virtually complete control over all elements of the licensees' work. The corporate licensor had the authority to approve all employees and had the automatic right to terminate the agreement; meanwhile, the licensee was required to discharge employees "immediately" upon the licensor's request and to conform to all store policies regarding wages, hours, and other terms and conditions (including paid vacations and holidays) of employment. The record did not establish whether the licensor exercised all of these retained controls, but the facts indicate the licensees *did* conform to the licensor's standards.

The Board also addressed the potential relevance of retained control in *Value Village*.[16] In that case, the Board found that a discount store was the joint employer of the employees working in the shoe department, which was operated by a licensee. The discount store retained total control over the shoe department and could "significantly affect the profits of its operators through its control over the allocation and reduction of floor space, the amount of overhead expense which is shared on a pro rata basis, and over advertising, pricing policies, and items of merchandise to be sold." As the Board noted, "[s]ince the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record." However, the Board also reached this decision in consideration of the "special nature of discount stores."

Thus, following *Greyhound* the Board sometimes, but not always, considered retained control to be probative of joint-employer status. However, the cases indicate that retained control over one or two terms and conditions of employment was insufficient to find joint-employer status. The few cases in which the Board found joint-employer status on the basis of

[14] 147 NLRB 1287 (1964).

[15] 162 NLRB 508 (1966).

[16] 161 NLRB 603 (1966).

retained control only were situations in which a party retained *virtually complete control* over every term and condition of employment.

2. The Board Would Not Find Joint-Employer Status Based on The Exercise of Indirect Control Alone

In *Sun-Maid Growers,* the Board found joint-employer status when contract electrical workers were assigned work by and supervised directly by Sun-Maid supervisors instead of by a supervisor from their employer-contracting company.[17] While the Board noted that a putative employer need not "hover over the maintenance electricians, directing each turn of their screwdrivers and each connection that they made," the control exercised by Sun-Maid in this case was nonetheless significant and only loosely defined as "indirect." Similarly, in *Hamburg Industries, Inc.*, a company was considered a joint employer because it "constantly check[ed] the performance of the [contract] workers and the quality of the work."[18] It is difficult to construe "constant" supervision as anything other than direct control.

In *Clayton B. Metcalf,* "the Board found significant indicia of control where a putative employer [a mine operator], although it 'did not exercise direct supervisory authority over' the workers [subcontractors] at issue, nonetheless" held "day-to-day responsibility for the overall operations" of the worksite and gave the subcontractors assignments in addition to those defined in the contract.[19] In other words, the Board did not appear to consider indirect supervisory control sufficient and instead looked to other indicia of control to find joint-employer status.

Other cases that addressed the potential probative value of indirect control also included evidence of direct control as well. For example, in *Floyd Epperson*, the Board considered the fact that a putative joint employer had indirect control over drivers' wages *and* direct supervisory control over the drivers' assignments.[20]

As these cases make clear, the Board has no established history of finding joint-employer status solely on the basis of indirect control. Its post-*Greyhound* decisions were largely faithful to common law agency principles in that they typically required some evidence of direct control and did not find retained control to be probative of joint-employer status unless it was *virtually absolute*.

3. The Board Has Never "Narrowed" The *Greyhound* Standard

It is clear from these decisions the Board never espoused a "traditional" joint-employer test that is anything close to the sweeping test adopted in *BFI.* A review of the more recent Board decisions overruled by *BFI* further demonstrates the Board has never "narrowed" the *Greyhound* standard in any meaningful way, but instead simply has expressed more clearly principles that were already reflected in the majority of the decisions described.

---

[17] 239 NLRB 346 (1978). It is also interesting to note that in this case, the Board held that it would recognize Sun-Maid as a joint employer so long as it "*exercised* effective control over the working conditions." (emphasis added).

[18] 193 NLRB 67 (1971).

[19] 233 NLRB 642 (1976).

[20] 220 NLRB 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974)..

The Board's efforts to clarify its joint-employer standard began with the Reagan Board in the early 1980's. In 1982, the Third Circuit endorsed the *Greyhound* "codetermine or share" standard for determining if two or more statutory employers are joint employers. The Court noted that some Board decisions had confused the joint-employer test with the separate "single employer" doctrine used to determine whether nominally separate entities were in fact a single, integrated enterprise such that they were truly one company. Clarifying that the single employer doctrine was not applicable in cases where two separate firms contracting for services share some level of control over one firm's employees, the Court noted that "the joint-employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment."[21] In adopting the Board's *Greyhound* standard as the correct standard in joint-employer cases, the Court stated:

> We hold therefore that . . . where two or more employers *exert significant control* over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA.[22]

Shortly after the Third Circuit's ruling in *Browning-Ferris*, the Board issued a pair of decisions that more clearly articulated its existing standard. In *Lareco Transportation and Warehouse*, the Board restated its joint-employer rule as follows:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment . . . To establish joint employer status there must be a showing that the employer *meaningfully affects* matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.[23]

The Board applied the standard to the facts before it to rule that Lareco was not the joint employer of truck drivers supplied under a leasing contract with another company. The Board noted that while Lareco provided some supervision of the drivers, it was "of an extremely routine nature," and that "[a]ll major problems relating to the employment relationship" were handled by the drivers' employer. Although Lareco provided the drivers with vehicles, occasionally provided direction regarding driver performance, and established driver qualifications and safety regulations, the Board held these factors were inadequate to establish the level of control required to find joint-employer status.

The Board reached a similar decision in *TLI, Inc.*, another case involving the provision of leased truck drivers by TLI to another company. The Board ruled that TLI's customer was not a joint employer of the drivers because "the supervision and direction exercised by [the customer] on a day-to-day basis is both limited and routine, and considered with [its] lack of hiring, firing,

---

[21] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d. Cir. 1982), enfg. 259 NLRB 148 (1981) (emphasis supplied).

[22] *Id.* at 1124 (emphasis supplied).

[23] 269 NLRB 324, 325 (1984) (emphasis supplied).

and disciplinary authority, does not constitute sufficient control to support a joint employer finding."[24]

The Board has consistently applied the clarified standard articulated in *Lareco* and *TLI* for over thirty years. Those decisions established several clear-cut and easy to understand principles:

> (1) the "essential element" in the joint-employer analysis is whether a putative joint employer's control over employment matters is "direct and immediate;"[25]
>
> (2) control, to be sufficiently indicative of joint-employer status, cannot merely be "limited and routine,"[26] and
>
> (3) the Board should not "merely" rely on the existence of contractual provisions, but rather must look "to the actual practice of the parties;" in other words, retained but unexercised control is insufficient by itself to create joint-employer status.[27]

While the *BFI* majority describes these cases as a narrowing departure from the clearly-established *Greyhound* line of precedent, they are better described as the Board's attempt to explain the way it had been applying *Greyhound* all along and, in doing so, to define the kinds of control that would qualify as "sufficient" to result in joint-employer status.

C. The Board's Prior Joint-Employer Standard Provided Businesses With Predictability and Stability in Their Business Relations

By now it should be relatively clear that the Board's pre-*BFI* precedent, while not always cogently explained, has remained relatively consistent for decades and has largely been faithful to Congress' command that employer status under the Act must be established based on common law agency principles. The Board's requirement that control must be "direct and immediate" to establish joint-employer status, and that retained but unexercised control alone is not probative of such status, are concepts that are easy to comprehend and apply in practice. These benchmarks have allowed businesses of all sizes to structure and enter into myriad business relationships – contractor-subcontractor; lessor-lessee; franchisor-franchisee; and parent-subsidiary, to name a few – with confidence that they could operate free from the fear of being found a joint employer, provided they followed the Board's guidance.

---

[24] *TLI, Inc.*, 271 NLRB 798 (1984).

[25] *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002); *see also Southern California Gas*, 302 NLRB 456 (1991) (building management company was not the joint employer of workers supplied by a janitorial company—regardless of the fact that the building management company dictated the number of workers to be employed, communicated specific work assignments to the workers' manager, and ultimately determined whether the cleaning tasks had been completed properly—because manager exercised no direct control besides communicating the job to the contractor and making sure contracted work was completed as requested).

[26] *AM Property Holding Corp.*, 350 NLRB 998 (2007) (noting the Board generally has found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work).

[27] *Id.* ("[T]he contractual provision giving AM the right to approve [contractor] hires, standing alone, is insufficient to show the existence of a joint employer relationship").

The Board's "direct and immediate" requirement also ensured that a putative employer must actually be involved in those matters most critical to the employment relationship, such as hiring, firing, scheduling, establishing wages, and directly supervising the performance of work. In a practical sense, employers who do not exercise this level of control over the employees of a staffing firm, subcontractor or franchisee are not "meaningfully" affecting the terms and conditions of their employment. The Board's prior precedent recognized this fact and did not subject companies to disputes or liability involving employees over which they had little control.

Moreover, the standard made sense for both "sides" of a given business transaction. A larger franchisor, or general contractor, may have contractual relationships with dozens (or even thousands) of business partners. It makes no sense to impute joint-employer liability to such entities if they are not in a position to directly address workplace issues, meaningfully affect the outcome of collective bargaining, or remedy the unlawful actions of their business partners.

On the other hand, the vast majority of small business owners – whether they are franchisees, subcontractors, or suppliers of temporary labor – are not in business to be middle managers. The Board's prior joint-employer standard allowed them to enter business relationships with the knowledge that they could operate their business with a degree of autonomy and freedom, which is the very reason they may have started a business to begin with.

At the same time, the Board's recognition that the exercise of control that is merely "limited and routine" does not give rise to joint-employer status allowed businesses to maintain a reasonable degree of commercial oversight over brand integrity, contractor efficiency, and overall quality without risking liability for doing so. It is not unreasonable for a major franchisor, for example, to expect that its franchisees adhere to certain standards that preserve and maintain the status of the franchised brand. Preservation of such standards are what enable the brand to succeed in the first place. Franchisees likewise benefit from adherence to such standards. Indeed, a small business owner may elect to open a successful restaurant franchise rather than his or her own branded restaurant specifically because the value and commercial attraction of the brand is likely to enhance the restaurant's profitability and ultimate success. That would not be possible if the franchise did not impose certain minimum standards on its franchisees. The Board's prior precedent recognized that maintenance of such standards alone should not turn the franchisor into a joint employer.

Similarly, a general contractor performing a major commercial or residential construction project must rely on the work of dozens of specialty trades. Sequencing the timing and execution of each of these trades is critical to successful completion of the project. Exercising control over the timing of the work performed by a subcontractor and expecting that the work will meet a certain minimum standard should not turn the general contractor into a joint employer. Again, the Board's prior standard would not have found a joint-employer relationship between the general contractor and its subcontractors based on the exercise of such indirect controls.

D. The *Browning-Ferris* Standard Radically Departs From Prior Precedent and Leaves Employers in The Dark as to The Relevant Standard

In *BFI*, the Board jettisoned its previously clear precedent in favor of a new standard of virtually unbounded scope. The Board's majority opinion takes employers, unions and employees alike on a confusing journey through prior precedent – misconstruing it along the way

– and concludes by establishing an amorphous standard that is both theoretically limitless and practically unworkable. The new standard allows for a finding of joint-employer status where an employer *retains, but does not exercise*, control over another firm's employees, or where it exerts only *indirect* control over their employment terms. This standard is a marked departure from the precedent discussed above. Moreover, it is unfaithful to the legislative intent underlying Taft-Hartley and divorced from the realities of American business.

To justify its expansive holding, the *BFI* majority argued that the current test's requirements "leave the Board's joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." The majority claimed that the increase in the number and scope of temporary employment arrangements in the United States over the past two decades "is reason enough to revisit the Board's current joint-employer standard."[28] Despite the majority's claims to the contrary, its justification for revisiting the test is grounded in the same "economic realities" philosophy that Congress rejected when it passed Taft-Hartley.

The BFI majority's holding is also based on the false premise that it was "returning" the Board's joint-employer precedent to the "traditional" standard it employed prior to *TLI* and *Lareco*, which it claimed unjustifiably "narrowed" the standard. As already demonstrated, this is simply not the case. Yet, the *BFI* majority's review of these cases reads as if the *Greyhound* test plainly allowed for a joint-employer finding based on exercise by the putative joint employer of a few isolated instances of indirect control and/or the retention (but not exercise) by the putative joint employer of some, but not substantial, control. Having set up this straw man, the *BFI* majority "restate[d]" the joint-employer standard, which it claimed "return[s] to the traditional test" first announced in *Greyhound*: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[29] The majority then continued with the following sweeping statement:

> We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.[30]

Despite referring to the common law, the majority offered no guidance – besides the new and disturbing passage quoted above – for determining when such a relationship might exist between putative employer and putative employee. The majority's articulation of its new test disturbingly suggests that retained control *by itself* can give rise to a joint-employer finding, and/or that the exercise of indirect control *by itself* can result in such a finding. This is evident in the manner in which the majority discussed why these elements of control are relevant in the first place.

---

[28] *BFI*, 362 NLRB 186, slip op. at 1, 11.

[29] *Id.* at 15.

[30] *Id.* at 2.

1. The Probative Value of Retained Control

The *BFI* majority argued that having the "right to control" is probative of an employment relationship—whether or not that right is exercised: "Where a user [of services] has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice."[31] Incredibly, the majority asserted that a situation in which "it appears that the user has, in practice, ceded administration of a term to a supplier" but "the user can still compel the supplier to conform to its expectations," is no less probative than a situation in which the joint employer actually exercises such control.[32]

In order to rationalize a potential joint-employer finding based solely on reserved control, the *BFI* majority insinuated that many cases decided under the *Greyhound* test treated the right to control the work of employees and the terms and conditions of their employment—alone—as probative of joint-employer status. For example, the majority alleged that in *Mobil Oil Corp.*, the Board found probative the fact that the operator retained the contractual power to set working hours, dictate the number of workers to be supplied, and terminate the contract at will.[33] In reality (and as explained above), the putative joint employer in *Mobil Oil* actually *exercised* these (and many additional) controls. Similarly, the *BFI* majority argued that in *Ref-Chem Co.*, the Board found probative the manufacturing company's retention of contractual power to terminate workers, set wage rates, approve overtime, and inspect and improve work.[34] Again, however, the putative joint employer in that case actually *exercised* virtually "complete control" over the workers at issue.

The majority also misconstrued cases like *Jewel Tea Co.* and *Value Village*, in which the Board considered the respective putative joint-employers' retention of complete control over nearly every term and condition of employment. Despite the fact that these decisions focused on the total amount of control retained by the employers, the *BFI* majority insinuated that the Board in those cases only considered the employers' control over one or two terms and conditions of employment, such as retaining the contractual power to terminate workers, and set working hours.[35] This was simply not the case.

2. The Probative Value of Indirect Control

The *BFI* majority also stressed that indirect control should be probative of a joint-employer relationship: "Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it is exercised) must be exercised directly and immediately."[36] The majority's explanation of this principle strongly suggests a willingness to find indirect evidence *alone* sufficient to establish a joint-employer relationship. For example, the Board noted that "in many contingent

---

[31] *Id.* at 14.

[32] *Id.*

[33] *Id.* at 9.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 14.

arrangements, control over employees is bifurcated between employing firms with each exercising authority over a different facet of decision making."[37] The majority then observed:

> Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control. The Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user firm.[38]

In other words, where the user firm exercises only indirect controls, and the service provider exercises all of the direct controls, the majority believes the user has exercised sufficient control to be a joint employer.

To justify this portion of its ruling, the majority cited to cases like *Sun-Maid Growers, Hamburg Industries*, *Clayton B. Metcalf*, and *Floyd Epperson* as evidence that indirect control, taken alone, can lead to joint-employer status.[39] However, as explained above, none of these cases were determined solely on the basis of indirect control. In each, the Board considered examples of indirect control but placed controlling weight on the presence of direct control. Moreover, the examples of "indirect" control present in these cases were significant (often bordering on direct control) and *always* accompanied by elements of more direct control. The *BFI* majority omitted these facts from its analysis.

In summary, despite its protests to the contrary, it is clear the test announced in *BFI* is a radical departure from the Board's prior precedent that "does not represent a 'return to the traditional test used by the Board,'" but instead "fundamentally alters the law" applicable to who is the "employer" under the Act.[40]

E. The Uncertainty Created By The Board's New Standard Will Lead to Unintended Legal Consequences, Stifle New Business Growth, Inhibit Job Creation, and Harm Small Business

The Board has a responsibility to establish and maintain precedents that offer some measure of predictability for employers and unions alike, and for good reason. "To comply with [the Board's] rules . . . substantial planning is required . . . When it comes to the duty to bargain . . . there is no more important issue than correctly identifying the 'employer.' Changing the test for identifying the 'employer,' therefore, has dramatic implications for labor relations policy and its effect on the economy."[41]

---

[37] *Id.*

[38] *Id.*

[39] *Id.* at 9.

[40] *Id.* at 23 (Miscimarra and Johnson, dissent).

[41] *Id.* at 21 (Miscimarra and Johnson, dissent).

Accordingly, the Board must articulate a compelling reason for changing a standard as critical as identifying the "employer," and when changing such a standard must do so in a manner that is understandable and practicably workable for the layperson. The new *BFI* standard does the opposite. As Member Miscimarra and former Member Johnson cogently pointed out in their dissent:

> The majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised 'right' to exercise 'indirect' control over what a Board majority may later characterize as 'essential' employment terms. This new test leaves employees, unions and employers in a position where there can be no certainty or predictability regarding the identity of the 'employer.' . . . This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk and litigation expense.[42]

Thus, the biggest concern with the Board's new test may be the sheer confusion that it has created going forward. Indeed, the *BFI* majority's sprawling opinion has been challenging to fully understand, even for the most experienced labor law practitioners. Since its release in August of 2015, labor lawyers have puzzled over how the test may apply in future cases. The test leaves numerous questions unanswered. For example, in the absence of evidence of the exercise of direct control by a putative employer, how much *indirect* control must the firm exercise before it is a joint employer? Must it exercise indirect control over a large number of factors, or just one or two? And how much retained, but unexercised, control will now be sufficient? Must the firm retain near total control? What if the evidence suggests the firm has actually exercised *no control at all*? And what about the case where a firm retains only the right to exercise indirect control? Could the Board now find joint-employer status in the case of an entity that retains only indirect control, and exercises no control, over a group of putative employees? The *BFI* majority does not answer.

These unanswerable hypotheticals beg a troubling question: if experienced labor lawyers are unable to determine with confidence how the test may apply in future cases, *how can business owners possibly be expected to understand how BFI may affect their businesses going forward*?

The answer is simple: they cannot. And that is the biggest problem with what the *BFI* majority has done. The uncertainty created by the Board's new test is likely to lead to analytical paralysis as firms struggle with how to address their potential liability under the standard. In this regard, the NLRB is not like the Department of Labor, or OSHA, where employers can request, and receive, opinion letters on the lawfulness of planned business activities. Notwithstanding the recent spate of overregulation from these agencies, employers seeking to comply with federal wage/hour and workplace safety laws can at least obtain reliable feedback from the agencies charged with enforcing those laws.

---

[42] *Id.* at 23 (Miscimarra and Johnson, dissent).

But the Board has no equivalent to the opinion letter. Employers cannot call or write to the Board and ask whether they will become a joint employer if they enter into a business transaction or include certain controls in commercial contracts. Instead, *the Board's legal precedents are supposed to provide that guidance*. And, as demonstrated throughout, the *BFI* decision does the opposite. The uncertainty over how the new standard might be applied will hamstring those in the business community seeking to structure their contractual relationships going forward.

1. The New Test Will Affect Myriad Business Relationships and Have a Devastating Effect on Small Business

The *BFI* test is not just a problem for businesses involved in leased worker arrangements. The test is open-ended enough to be applied to find joint-employer status in virtually *any* business relationship. The dissenting Members understood and highlighted this troubling fact:

> Contrary to [the majority's] characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act.[43]

The dissent's warning is easily illustrated by several examples:

General Contractor – Subcontractor

One of the primary responsibilities of a general construction contractor is making sure that projects are completed on time in order to meet inspections and delivery requirements. To do this, general contractors commonly exercise tight control over the timing and sequencing of the services performed by specialty trades and other subcontractors. They may require additional labor and/or increased overtime when delays threaten to run a project behind schedule. They may also delay the completion (or even the commencement) of a particular subcontractor's work in order to allow for the completion of a different part of the project. This is arguably strong indicia of control by the general contractor over the terms and conditions of employees of its subcontractors, i.e., scheduling. It is unclear, given the amorphous new standard, whether the exercise of control over subcontractor scheduling alone would turn a general contractor into a joint employer, but in combination with other indicia, it would be almost certain to do so.

A finding of joint-employer status between general contractor and subcontractor could cause a variety of problems at a construction site. If the general contractor is a joint employer with its subcontractors, and a labor dispute arises between one of the subcontractors and its union, it may be impossible for the general contractor to set up a valid reserved gate system, which allows neutral employers to avoid picketing and other concerted activity in which unions may lawfully engage during disputes with primary employers. Moreover, the general contractor's status as a joint employer could prevent it from replacing a subcontractor whose employees go out on strike, as doing so may now be an unfair labor practice. Thus, an entire commercial construction project could be paralyzed because of the labor problems of a single

[43] *Id.* at 23 (Miscimarra and Johnson, dissent).

subcontractor. The resulting delays could cause the general contractor to incur millions of dollars in penalties for failing to complete the project on time.

While some might view such actions by a general contractor to be "anti-union," it should be obvious that a general contractor's decision to replace a striking subcontractor may have no effect on the result of collective bargaining negotiations between the subcontractor and its union or on the ultimate employment status of the subcontractor's employees. The subcontractor may have dozens of other jobs (all of which may be union jobs) to which it can assign its workforce. The general contractor should not be forced into the practical equivalent of commercial handcuffs while it waits for a subcontractor to resolve matters with its union. But a finding of joint-employer status under *BFI* would do just that. A general contractor with several dozen specialty subcontractors could be completely paralyzed as a result.

In this way, *BFI* could have the perverse result of encouraging general contractors to avoid bidding on union jobs, at least in geographic areas where nonunion labor is a viable alternative, which would shrink their portfolio of projects and impact their own employment levels. Alternatively, general contractors may simply refrain from working with unionized subcontractors in order to avoid being trapped in a business relationship they cannot get out of without risking substantial labor law liability. Another possibility is that general contractors will insource specific trades. Such decisions will reduce the number of opportunities for outside subcontractors. The economic impact on the subcontractors – many of which are small businesses – and their employees, could be significant.

Alternatively, general contractors who cannot insource certain specialty trades may decide to exert *total control* over the work of their subcontractors. If a general contractor concludes it is going to be a joint employer under *BFI* no matter what it does, it may go in the other direction and dictate everything about a subcontracted project. This would dramatically reduce the subcontractor's own flexibility and reduce it to a mere subdivision of the general contractor instead of an independent business.

Franchisor – Franchisee

According to the International Franchise Association, which submitted an amicus brief in *BFI* opposing the new standard, in 2012 there were 750,000 franchises in the United States employing over 8 million workers. These businesses generated a staggering $769 billion in economic output and accounted for approximately 3.4 percent of America's gross domestic product.[44] Virtually all franchises must exercise some level of control over the consistency and integrity of the franchised brand so that both parties – franchisor and franchisee – can reap the benefits of the brand. Indeed, the franchisor is legally required to maintain control over its brand in order to maintain the trademarks it has licensed to franchisees.[45] Prior to *BFI*, the Board avoided finding joint-employer status in most franchisor-franchisee relationships absent evidence

[44] Br. of IFA at 1.

[45] *See, e.g., Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002)("A trademark owner may grant a license and remain protected provided quality control of the goods and services maintained under the trademark by the licensee is maintained").

of direct control.[46] But now, if a franchisor retains and/or exercises control over the manner in which the franchisee sets up a store, how it prepares and markets its products, what tools or equipment it uses in the performance of the franchised business, and how the franchisee's employees operate the business, the Board may find it has retained sufficient indirect control over the employment terms of the franchisee's employees to be their joint employer. Thus, franchisors may be exposing themselves to joint-employer liability simply by maintaining controls that are legally required in order to preserve the status of their trademarks under federal law.

The consequences of a broad application of the *BFI* standard to the franchising industry could be catastrophic. Large franchisors cannot possibly be expected to know, let alone attempt to control, all of the minute details regarding the employment relations of their franchisees. But if *BFI* would make them joint employers with their franchisees, many franchisors might elect to reduce their use of the franchise model in order to protect themselves from legal liabilities the franchise model was created to avoid in the first place. The reduction in the use of the franchise model could have a deleterious effect on job creation and reduce the number of opportunities for small business entrepreneurs to realize their dreams of owning their own business. Small business franchisors could be equally damaged by the ruling. For example, the owner of a fledgling franchise may decide never to expand, lest he or she risk the unthinkable prospect of becoming a joint employer every time a new franchisee signs on.

Alternatively, franchisors may decide, as in the construction industry, that control over their brand is too important, not to mention legally required. Instead of implementing measures to avoid joint-employer status (indeed, in most cases it will be unrealistic for a franchisor to allow franchisees to make their own decisions about store appearance, product type and quality, etc.), franchisors may embrace that status and impose near total control over their franchisees. Franchise owners would be reduced to middle managers and lose the ability to manage their small business free from outside interference.

2. Other Negative Effects on Small Business

The business hypotheticals discussed above illustrate just a few of the many harms the *BFI* test may cause small business owners under federal labor law. But the Board's new test may cause additional fallout in other areas of the law. For instance, other federal agencies have signaled a willingness to adopt the same broad joint-employer test announced in *BFI*. The EEOC submitted an amicus brief to the Board prior to the issuance of *BFI* in which it argued for an expansion of the standard. Employers may safely assume the EEOC will push to expand the concept of joint-employment in Title VII cases. And litigation plaintiffs have already cited to *BFI* in arguing for an expansion of the joint-employer standard in other contexts. Thus, while a finding of joint-employer status before the Board may not automatically relegate a business to that status before other federal agencies or in state or federal court, the *BFI* standard has already inspired employee advocates to push the Board's standard into other areas of the law.

---

[46] *See, e.g., Tilden, S.G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, despite franchise agreement dictating "many elements of the business relationship," because franchisor did not exercise "direct control" over franchisee's labor relations).

The "spillover" effect from *BFI* may have yet additional consequences. For example:

Threshold employer coverage. Many federal labor and employment statutes, such as Title VII of the Civil Rights Act, have small business exceptions in that they only apply to employers with a certain minimum number of employees. A finding that a small business owner is a joint employer with its franchisor, general contractor or other business partner could artificially eliminate those exceptions by forcing the small business owner to count the employees of its business partner in its total employee complement for purposes of coverage under statutes like Title VII.[47] Many smaller businesses are unprepared for the dramatic increase in administrative burden and litigation expense that would come with coverage under such statutes.

Affordable Care Act Issues. The ACA's employer mandate requires any employer with 50 or more "full-time equivalent employees" to provide certain minimum levels of health coverage to such employees and their dependents, or face expensive penalties. If small businesses with 49 or fewer employees are deemed to be joint employers with their business partner(s), they may be required to comply with the ACA's employer mandate requirements. Determining and maintaining compliance will impose administrative burdens that most small employers are not set up to manage effectively.

Blacklisting in Federal Contracting. In July of 2014, the President signed Executive Order 13673, "Fair Pay and Safe Workplaces," which requires federal contractors and subcontractors to disclose all of their "labor violations" for the 3-year period preceding their submission of a contract bid. The Executive Order covers 14 federal labor and employment laws and their state equivalents and require reporting of un-adjudicated "violations" such as EEOC cause determinations, OSHA charges, notices of wage and hour determinations, and NLRB complaints. The Board's new *BFI* test could require a bidding contractor to report on the violations of its vendors, suppliers and others with whom it contracts to supply services, even in situations where the bidder does not plan to use those partners in the performance of the federal contract. Thus for example, a small business owner who is required to provide the prime contractor with a report of its own "violations" may be required to report the violations of an unrelated business partner with whom it shares joint-employer status. Thus, *BFI* will exacerbate the administrative difficulty of compliance with the Executive Order

F. The Board's (and Other Executive Agencies') Actions Since *BFI* Offer No Comfort to Employers

Proponents of the Board's new standard have argued that the employer community is overreacting to the *BFI* decision. They contend the test will not have the effect that many have warned it will have, pointing to several recent Board actions that they claim prove the *BFI* test is reasonable and limited to the facts of that particular case. None of these arguments are convincing.

---

[47] *See* EEOC Compliance Manual, Section 2: "To determine whether a respondent is covered, count the number of individuals employed by the respondent alone and the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for each employer with which s/he has an employment relationship."

1. Freshii Advice Memorandum

On April 28, 2015, the Board's Division of Advice issued a nonbinding memorandum opinion on whether Freshii, a fast-casual restaurant franchisor, should be held responsible as joint employer for unfair labor practices allegedly committed by one of its franchisees. Applying *BFI* to the facts of the case, the Board's Associate General Counsel opined that Freshii was *not* a joint employer with its franchisee. The Freshii memo has led some to assert that *BFI* is not as overbroad as the employer community claims and that franchisors in particular have nothing to worry about under the new standard. These arguments are misleading. First and foremost, NLRB advice memoranda are not precedential and do not constitute Board law.[48] The Advice Division's apparent conclusion that Freshii is not a joint employer with its franchisee has no legal impact on any employer besides Freshii itself, and certainly does not bind the full Board, which may have reached a different conclusion altogether.

Second, the facts of the case are not representative of the vast majority of franchise relationships in the United States. The operations manual Freshii provides its franchisees states that its own personnel policies and procedures are not required to be adopted, and its franchise agreement *expressly disclaims all control* over franchisees' labor and employment matters. Moreover, the operations manual's instructions on items as fundamental as menu preparation, food safety regulations, instructions on how to use and clean equipment, and guest service issues, are referred to as mere "guidance."

Obviously, franchisors that impose greater controls over product type and quality, customer experience, and the like, can take no comfort in the Freshii memo. For example, it would be impossible for a five-star hotel brand to provide "optional" input to its franchisees on matters such as cleaning and sanitation standards, availability of certain amenities, and how staff must treat guests, and maintain any realistic expectation of ensuring brand quality. Freshii does nothing to alleviate fears that implementation of such measures could turn the brand owner into a joint employer.

2. Green JobWorks ALJ Decision

On October 21, 2015, the Regional Director of NLRB Region Five issued a Decision and Direction of Election in a representation proceeding finding that ACECO, a licensed demolition and environmental remediation company, was not a joint employer with Green JobWorks ("GJW"), a staffing company that provides demolition and asbestos abatement workers to client construction companies, including ACECO, in the mid-Atlantic region. The facts of the case reflected that GJW's employees were skilled and trained to perform a specific and specialized task for GJW clients, a factor that weighs against employment status under the common law.

Additional relevant facts included the following: ACECO imposed no limitations whatsoever on how much GJW could pay its workers; GJW provided lead workers on ACECO jobsites, who were responsible for documenting worker hours, determining break times, and removing workers from the sites if necessary; ACECO provided safety equipment to its own employees, but not to GJW employees; ACECO could request specific workers but GJW

[48] *See Kysor/Cadillac*, 307 NLRB 598, 603 (1992) ("advice memoranda do not constitute Board law"); *Geske and Sons, Inc.*, 317 NLRB 28 (1995) (same).

retained ultimate control over where to assign its employees; ACECO's reserved right to request the removal of a GJW employee from the worksite was limited to safety issues or other "reasonable objections" which must be "explicitly stated" by ACECO; the general contractor, not ACECO, had ultimate control over the worksites and the work schedule, thus GJW workers' hours were indirectly controlled by the general contractor. On these facts, the Regional Director found ACECO was not a joint employer with GJW.

While this decision may have caused some temporary relief among those in the employer community, that relief was short-lived. The union in the case filed a request for review of the Regional Director's decision arguing that *BFI* required a finding that ACECO was a joint employer with GJW. Just last week, the Board accepted the union's request for review, strongly signaling its intent to overturn the Regional Director and find that ACECO is indeed a joint employer.[49] If that turns out to be the case, the Board would obliterate the temporary staffing relationship. The facts in GJW reflect the exercise by ACECO of *virtually no direct control whatsoever* over GJW employees. An adverse decision by the Board would send a message to contractors that leased worker arrangements will always lead to joint-employer status under the Act.

3. McDonald's Unfair Labor Practice Cases

The entire labor relations community – management and labor alike – has been closely following the McDonald's unfair labor practice trial, which began last week and is expected to be one of the largest and most significant Board proceedings in recent memory. The Board's General Counsel, who advocated for a change in the joint-employer standard in *BFI*, has alleged that McDonald's is a joint employer with close to 80 of its franchisees located across the United States and that it should share liability for the franchisees' allegedly unlawful discipline and discharge of employees who participated in union-led protests over their wages and working conditions. For all the reasons discussed above, a finding that McDonald's is a joint employer with its franchisees could have a massive chilling effect on the willingness of franchisors to continue leasing their brands to small business owners across the United States.

As this massive trial begins, McDonald's is likely taking no comfort in the Freshii memo. Indeed, its reasoning apparently has had no impact on the Board's General Counsel, who is pressing forward with the NLRB's version of the "trial of the century" with McDonald's and its franchisees directly in his crosshairs.

4. Other Federal Agency Action

Unfortunately, the Board is not the only executive agency seeking to expand joint-employer liability under federal law. Earlier this year, David Weil, the administrator of the Department of Labor's Wage and Hour Division, issued an Administrative Interpretation that appears to broaden how DOL will determine joint-employer relationships under the Fair Labor

[49] Member Miscimarra dissented from the Board's grant of review, noting that the Regional Director "applied the standard recently announced in [BFI] . . . as explained in the BFI dissenting opinion . . . I would adhere to precedent requiring proof that a putative joint employer actually exercises 'direct and immediate' control over the essential terms and conditions of employment of individuals in the petitioned-for bargaining unit in a manner that is neither 'limited' nor 'routine.' In my view, the Petitioner has failed to raise a substantial issue warranting review under the pre-BFI precedent." *Green JobWorks LLC*, Case 05-RC-154596 (Mar. 8, 2016)(Miscimarra, dissent).

Standards Act and other federal labor laws.[50] The DOL guidance distinguishes for the first time between "horizontal" joint-employment – where two entities each separately employ the same employee, but are closely aligned through shared management or other economic factors – and "vertical" joint-employment – where the employee of one business is economically dependent on another business that has contracted with the employee's actual employer. With respect to the latter, the DOL uses the same "economic realities" test that Congress rejected with respect to the NLRA when it passed Taft-Hartley. Thus, the DOL's view of joint-employment is (and has been) far more expansive than the standard announced by the Board in *TLI* and *Lareco*.

The guidance is brazenly open about its purpose – to target larger businesses. Weil writes that "where joint employment exists one employer may also be larger and more established with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance." Roughly translated, Weil is urging his investigators to use the joint-employer theory to pursue the alleged wage and hour violations of small businesses by lumping them together with a larger business partner with "deeper pockets." But by attempting to drag bigger businesses into the affairs of their suppliers, franchisees and subcontractors, the DOL is advocating for interpretations of federal law that will adversely affect small businesses, for all of the reasons discussed above.

The DOL is not the only other federal agency encouraging its investigators to push the boundaries of joint-employer standards. Shortly before the Board issued its decision in *BFI*, reports surfaced of an internal OSHA memo encouraging investigators to conduct a joint-employer analysis when investigating violations alleged against franchisees. The memo suggests that "a joint employer standard may apply where the corporate entity exercises direct or *indirect* control over working conditions, has the *unexercised potential to control* working conditions or based on the *economic realities*." The memo goes on to instruct investigators regarding the kinds of information to obtain from subjects of OSHA investigations going forward.

The OSHA memo advocates for the use of virtually the same test announced by the *BFI* majority as well as the "economic realities" test used by the DOL. OSHA practitioners have observed that this standard is much more expansive than the "controlling employer" test traditionally used by OSHA to determine which business is liable for a health and safety violation on a multi-employer worksite.[51] OSHA's apparent push to adopt the *BFI* test (or worse, the "economic realities" test) as its own would subject many businesses to OSHA liability even where they are unaware of, and have no control over, workplace hazards.

The fact that three federal agencies – the Board, the DOL and OSHA – appear to be pushing for a change in their joint-employer standards at the same time suggests a larger effort by the Executive Branch to expand joint-employer liability in the United States.

[50] DOL Administrative Interpretation No. 2016-1 (Jan. 20, 2016).

[51] OSHA Directive CPL 2-0.124, "*Multi-Employer Citation Policy,*" December 10, 1999

III. CONCLUSION

The Board "owe[s] a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that 'we'll see how it floats.'"[52] Unfortunately, that is precisely what the Board has done in *BFI*. Its sprawling and potentially limitless new joint-employer test has left American business grasping in the dark for guidance on how to go forward under the new standard without risking significant liabilities they did not plan for. With the likely extension of the *BFI* standard in cases such as *Green JobWorks* and *McDonald's* on the horizon, not to mention the efforts of DOL and OSHA to expand their own joint-employer standards, the state of affairs for businesses in this country is only going to get worse.

In an increasingly competitive economic landscape, businesses of all sizes make decisions every day on how to remain successful in relation to their competitors. In many cases, this includes entering into contractual arrangements with outside vendors to administer certain aspects of their business. These relationships allow larger employers to focus on their core entrepreneurial mission, while at the same time creating opportunities for small businesses to flourish.

Sadly, these relationships may become less attractive to both parties – user and supplier, franchisor and franchisee, general contractor and subcontractor – given the uncertainty over whether entering such relationships will bring unanticipated liabilities. Perhaps the biggest problem with the course on which the Board and other executive agencies appear to be headed is that it is fundamentally disconnected from, and tone-deaf to, the realities of American business. The current Board majority, well-intentioned though it may believe itself to be, is issuing decisions that stifle new business growth and mire business owners in endless regulation.

It has to stop somewhere. Congress must intervene and return the Board's joint-employer standard to the well-understood rule that existed for decades before the issuance of *BFI*. The continued vitality of many longstanding business relationship models, as well as the ability of small business owners to continue to thrive in this country, may well depend on it.

---

[52] *BFI*, slip op. at 48 (Miscimarra and Johnson, dissent).

March 17, 2016

The Honorable Cresent Hardy
Chairman, Subcommittee on Investigations,
Oversight and Regulations
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Alma Adams
Ranking Member, Subcommittee on
Investigations, Oversight and Regulations
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hardy and Ranking Member Adams,

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing in regard to Thursday's Subcommittee hearing titled, "Risky Business: Effects of New Joint Employer Standards for Small Firms." We appreciate your consideration of this important issue that has the possibility to dismantle business models in the construction industry and across America's economy.

On August 27, 2015, the National Labor Relations Board (Board or NLRB) issued its decision in *Browning-Ferris Industries* altering the "joint employer" standard under the National Labor Relations Act. The standard is used to determine when two separate companies are considered one employer with respect to a group of employees for purposes of liability and bargaining obligations under the National Labor Relations Act (NLRA). Prior to this decision, companies were only deemed joint employers when they both exercised "direct and immediate" control over the "essential terms and conditions of employment." In *Browning-Ferris*, however, the Board overturned 30 years of precedent to impose a new standard expanding the definition to include those employers who have "indirect" control and "unexercised potential" control.

In the construction industry, the contractor-subcontractor model has become an integral tool used to complete small and large scale projects safely, on time and on budget. Under the Board's new interpretation of a joint employer, general contractors will likely avoid increased costs and liabilities and limit hiring subcontractors, who are often small and locally owned specialty businesses. The negative consequences of NLRB's overreach will be felt throughout our industry and the entire economy, which can nill afford anti-growth policies during this time of struggling recovery.

We thank you again for scheduling this hearing to address this important issue and look forward to working with Congress to ensure locally owned businesses and their employees are protected.

Sincerely,

Kristen Swearingen
Vice President of Legislative & Political Affairs

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

March 16, 2016

The Honorable Cresent Hardy
Chairman
Small Business Subcommittee on Investigations, Oversight and Regulations
U.S. House of Representatives
Washington, DC 20515

Re: AGC Concerns with New Joint Employer Standard

Dear Chairman Hardy:

The Associated General Contractors of America (AGC) thanks you for holding the hearing entitled "Risky Business: Effects of New Joint Employer Standards for Small Firms." The National Labor Relations Board's (NLRB) August 27, 2015, opinion in the *Browning-Ferris Industries* case relaxes the standard for determining when two companies constitute "joint employers" under the National Labor Relations Act (NLRA). Administrator's Interpretation No. 2016-1 issued by the Department of Labor's Wage and Hour Division on January 20, 2016, sets forth an even broader definition of "joint employer" under the Fair Labor Standards Act (FLSA) and the Seasonal Agricultural Worker Protection Act. AGC is concerned about these changes and the impact they may have on small businesses in the construction industry.

Prior to the *Browning-Ferris Industries* decision, the NLRB maintained that separate entities are considered joint employers only if they share direct control over, or co-determine, essential terms and conditions of employment. The new, relaxed standard goes so far as to render one company a joint employer of an unrelated company's workers when the putative joint employer has exercised only indirect control over those workers' terms and conditions of employment through an intermediary, or even if it has the potential to exercise control but has never actually exercised control. Moreover, the vagueness of the totality of circumstances test set forth in the *Browning-Ferris Industries* has left employers with almost no guidance as to when they may be crossing the line. Employers are left unable to predict when they will be found to be joint employers under the NLRA and, therefore, left unable to determine appropriate actions to prevent such a finding.

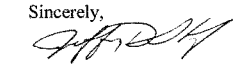
A "joint employer" finding is significant. Companies that are joint employers may be held jointly responsible for any unfair labor practices and collective bargaining obligations related to the workers. In the construction industry, it could also mean losing the protections from secondary boycott activity accorded to neutral employers in NLRA Section 8(b)(4).

These changes can disrupt long-standing standards in labor law and potentially change the way the industry operates. The change could also have a particularly destabilizing impact on well-settled subcontracting practices in the construction industry, where critical issues such as safety and scheduling often dictate that a contractor have some say in how its subcontractors'

employees behave and have some oversight in their terms and conditions of employment. Small businesses are the most vulnerable because they are less likely to have the legal advice, staff time, or bargaining power to structure business arrangements that minimize their risk of inadvertently becoming a "joint employer" under the new standard.

AGC looks forward to working with Congress on changing the definition under the NLRA to its previous standard and on keeping the Administrator's Interpretation of the standard under the FLSA from becoming law.

Sincerely,



Jeffrey D. Shoaf
Senior Executive Director, Government Affairs

AHLA
AMERICAN HOTEL & LODGING ASSOCIATION

Statement for the Record

Submitted by the American Hotel & Lodging Association

Before the

House Committee on Small Business

Subcommittee on Investigations, Oversight and Regulations

"Risky Business: Effects of New Joint Employer Standards for Small Firms."

March 17, 2016

On behalf of the American Hotel & Lodging Association (AH&LA), the sole national association representing all sectors and stakeholders in the U.S. lodging industry, including owners, REITs, chains, franchisees, management companies, independent properties, suppliers, and state associations, we thank Chairman Hardy and Ranking Member Adams for the opportunity to submit a statement for the record for the House Small Business Committee Subcommittee on Investigations, Oversight and Regulations hearing, "Risky Business: Effects of New Joint Employer Standards for Small Firms." We appreciate the Committee's attention to this critical issue facing the hospitality industry.

The lodging industry is one of the nation's largest employers. With nearly 2 million employees in cities and towns across the country, the hotel industry generates $176 billion in annual sales from 4.9 million guestrooms at 53,432 properties. It's particularly important to note that the lodging industry is comprised largely of small businesses, with more than 55% of hotels made up of 75 rooms or less.

Our industry's strong growth, sales, and employment base are key reasons that lodging has led the nation's economic recovery with month after month of growth, leading to six straight years of job creation. The lodging industry is a valuable contributor to the local and national economy, creating well-paying jobs and career opportunities for millions of people. Hoteliers strive each day to make sure those opportunities continue to grow. We are concerned, however, that recent decisions from the National Labor Relations Board (NLRB) could jeopardize our employers and employees alike.

For more than three decades, the joint employer standard has been one of the cornerstones of labor law, protecting businesses from undue liability involving employees over which they do not have actual or direct control. Unfortunately, through its *Browning-Ferris Industries (BFI)* decision, the NLRB has completely re-written the joint employer standard by including "indirect" and "potential" control into its decision. In doing so, the NLRB has ignored years of legal precedence and has created an environment of uncertainty that will put pressure on primary companies to assert more authority over small businesses to limit new potential liabilities under federal labor law. Small businesses are now fearful of undue liability involving the actions and activities of employees of subcontractors, suppliers and vendors, over which they do not have actual or direct control.

AH&LA commends hotelier and small business owner Vinay Patel, President and CEO of Fairbrook Hotels of Herndon, Virginia and board member of the Asian American Hotel Owners Association (AAHOA), for taking the time away from his businesses to testify before the Committee on this issue, which could have a profound impact on his business and thousands of other franchised hoteliers. Mr. Patel is the embodiment of the American Dream, taking an enormous financial risk by opening his first hotel as an independent, without the benefit of assistance from any hotel brand, and building a successful small business that includes eleven properties and more than 150 employees.

As Mr. Patel succinctly points out in his testimony, changes to the joint employer standard by the NLRB is completely contrary to his experience of successfully building a small business. The NLRB and its short-sighted decision to alter the joint employer standard fails to recognize that he, like many other independent hotel owner-operators, is responsible for the hiring and firing, setting the schedule and conducting employee reviews all the while trying to turn a profit and hopefully create more jobs. Mr. Patel has a contractual licensing agreement with the several franchisors, but as he states in his testimony, he fears that changes to the joint employer standard will, "...foreclose entrepreneurship opportunities for small business and transform franchisees into managers and employees from independent owners and operators."

Moreover, changes the joint-employer standard could drastically alter thousands of contractual agreements already in affect between franchisors and franchisees. If a franchisor were to be held liable for the actions and activities taken by one of their franchisees or one of their franchisees' employees or subcontractors, then the business relationship and the contracts that govern that relationship would have to be wholly reconstituted. In its most basic terms, the franchisor licenses and protects its brand while the franchisee owns and operates a location of that brand as a licensee. Broadening employer liability to those employees that they do not have direct control over will lead to larger businesses being less inclined to subcontract out portions of its business to smaller businesses and subcontractors.

As illustrated by testimony of both Mr. Patel and the other small business employers testifying today, the NLRB's changes to the joint employer standard would serve only to disincentivize small business entrepreneurs from starting businesses and creating jobs. Small employers have relayed their concerns and uncertainty surrounding the impacts of the *BFI* decision. As our economy slowly rebounds from the recession, Congress and the federal government should be promoting policies that foster and incentivize job growth, free enterprise, and a stable regulatory environment. Regrettably, the NLRB's decision in *BFI* has done the opposite, creating unnecessary anxiety and uncertainty within the small employer community. AH&LA strongly urges Congress to revert back to the previous joint employer standard which provided certainty and clarity for hundreds of thousands of small businesses for more than three decades as it relates to their workforce and their business to business contractual agreements.

Thank you for your attention to this issue and we appreciate the opportunity to offer our industry's perspective. We hope the Committee will take our testimony into account as it continues its review of this important economic issue.

Statement

of the

Independent Electrical Contractors

Before the

Small Business Subcommittee on Investigations, Oversight and Regulations

United States House of Representatives

Hearing on

Risky Business: Effects of New Joint Employer Standards for Small Firms

Washington, DC

March 17, 2016

Independent Electrical Contractors

Chairman Hardy, Ranking Member Adams and Members of the Subcommittee, the Independent Electrical Contractors (IEC) would like to express its concern with the recent interpretation of the joint employer rule by the National Labor Relations Board (NLRB) in the case commonly referred to as "Browning-Ferris." IEC opposes this new, broad interpretation and urges the United States Congress to pass the Protecting Local Business Opportunity Act (H.R.3459/S.2015), which would codify the previous standard that has stood for over 30 years.

The Independent Electrical Contractors is an association of over 50 affiliates and training centers, representing over 2,100 electrical contractors nationwide. While IEC membership includes many of the top 20 largest firms in the country, most of our members are considered small businesses. Our purpose is to establish a competitive environment for the merit shop – a philosophy that promotes free enterprise, open competition and economic opportunity for all. IEC and its training centers conduct apprenticeship training programs under standards approved by the U.S. Department of Labor's (DOL) Office of Apprenticeship. Collectively, IEC trains more than 8,000 electrical apprentices annually.

IEC is deeply concerned about the NLRB's new joint employer standard and the impact it could have on the electrical contracting industry. The new standard presents a litany of potential problems and complications for doing business by making contractors potentially liable for individuals they do not even employ. Moving forward, almost any contractual relationship our members enter into may trigger a finding of joint employer status that would make them liable for the employment and labor actions of their subcontractors, vendors, suppliers and staffing firms. In addition, as we understand it, the new standard would also expose one company to another company's collective bargaining obligations and economic protest activity, to include strikes, boycotts, and picketing.

It's clear to see just how this broad and ambiguous new standard increases the cost of doing business. It makes it more difficult for companies to continue to do great work within the community and provide well-paying jobs to more electricians. It's unclear if our members could put language into any contracts that would insulate them from being considered a joint employer, nor do we know just how much their insurance costs will go up in an attempt to shield them from this increased liability. This new standard also prevents electrical contractors from working with certain start-ups or new small businesses that may have a limited track record. For example, one IEC member will sometimes take on certain small businesses as subcontractors, which will often times be owned by minorities or women, and help mentor them on certain projects. With this new standard, they are now less likely to take on that risk. Many of our members that do contracting work with the federal government may now be less likely to bid on federal contracts over $1.5 million, under which the Federal Acquisition Regulation (FAR) system mandates they contract with small businesses.

In conclusion, IEC urges Congress to consider the negative consequences this new standard has on businesses and the communities they serve, and pass the Protecting Local Business Opportunity Act. Thank you.

STUART HERSHMAN

PARTNER

DLA PIPER LLP (US)
CHICAGO, ILLINOIS

TESTIMONY BEFORE THE U.S. HOUSE SMALL BUSINESS SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS

HEARING ON "RISKY BUSINESS: EFFECTS OF NEW JOINT EMPLOYER STANDARDS FOR SMALL FIRMS"

MARCH 17, 2016

I. Introduction

Chairman Hardy, Ranking Member Adams, and distinguished members of the Subcommittee. My name is Stuart Hershman, and I am a partner in the Chicago, Illinois office of the international law firm DLA Piper LLP (US). I am submitting this testimony on behalf of both myself and the International Franchise Association ("IFA"), the world's oldest and largest organization dedicated to representing and protecting the interests of franchising worldwide, of which DLA Piper has been proud to serve as outside General Counsel for the IFA's entire 56-year existence. I also am submitting this testimony on behalf of, effectively, every person and business in the United States who value and rely on the franchising method of distributing goods and services. Thank you for this opportunity.

All of us involved in franchising—franchisors, franchisees, suppliers and counselors to franchise systems, franchised business employees, small business advocates, and other interested parties—are deeply troubled by the National Labor Relation Board's ("NLRB") recent adoption of a new "joint employer" standard in its partisan 3-2 decision on August 27, 2015, in the *Browning-Ferris* case as well as by increased federal agency intrusion (by the Department of Labor and OSHA) into the franchisor-franchisee small business relationship emboldened by the NLRB's decision.

This Subcommittee and other U.S. House of Representatives and Senate committees have received testimony over the past 18-plus months, even before the *Browning-Ferris* decision, on the threat posed to the franchise business model by any change in the former, long-standing joint employer standard. The prospect of such a change reared its head most prominently in NLRB General Counsel Richard Griffin's December 2013 *amicus* brief in the appeal to the full NLRB of an earlier anti-unionization ruling in the *Browning-Ferris* case. Committee testimony since that time opposing a change in the joint employer standard has been proffered by franchisor executives, franchisee executives, academicians, and lobbying groups, among others. I respectfully submit my testimony from a different perspective—as an attorney who has spent almost 30 years of legal practice focused exclusively on representing businesses wishing to grow their brands domestically and internationally through the franchise model.

II. Uncertainty Due to New Joint Employer Standard

To the dismay of all, however, the NLRB's *Browning-Ferris* decision presents a mortal danger to franchising unseen for close to 50 years. That danger? Uncertainty. Uncertainty in how the dynamic, creative, and vibrant franchisor-franchisee relationship—manifested by roughly 800,000 franchised businesses already open and operating in the United States and by hundreds of thousands of new franchised businesses that we would expect, under ordinary business conditions, to be formed in the future to drive the American economy forward—will be challenged and judged by those with ulterior motives who bristle at its very existence. Uncertainty in how carefully-constructed and crafted interdependent, yet independent, business relationships between franchisors and franchisees, reflected in extant long-term, binding contracts, will be impacted by after-the-fact determinations based on nebulous, unpredictable factors. And uncertainty in how new franchise systems can be expected, confidently and

reliably, to structure new franchised business relationships to avoid the substantial legal risk of later being deemed a joint employer of the franchisee's employees. Uncertainty that can be extinguished, quite frankly, only by restoring to federal labor law the "joint employer" legal standard based on "direct and immediate control" over another's employees.

Why is "uncertainty" so poisonous to franchising and business creation? When businesses structure, develop, document, and implement new franchise programs, and when existing franchise systems review, assess, modify, and improve their programs over time to address economic change and other business exigencies, they focus on how the fundamental principles of the franchising method of distribution impact their businesses. Among other things, they consider:

- How best to convey to franchise owners, executives, and employees the operational underpinnings of their business models, in terms of the quantity and quality of initial and ongoing training programs, guidance, and support;

- How best to ensure that newly-established franchised businesses are properly constructed, developed, launched, and maintained to convey the uniform physical identity and branding the franchisor has created;

- How best to perpetuate and protect the brand promise, and concomitantly comply with their quality control obligations under the federal Lanham Act, that all licensed franchisees will produce, offer, and sell products and services of a consistent quality;

- How best to ensure that franchisees remain good "corporate citizens" by complying with all applicable federal and state laws and pursuing "best practices";

- How best to reflect the franchisor's and franchisees' respective revenue goals and business risks in the franchise system's fee structure to create an economically-balanced and sustainable franchise system; and

- How best to ensure that consumer health and safety are not endangered by substandard franchise operators.

Reciprocally, franchisees crave franchisor controls, directions, and best practices because franchisee success depends in large measure on the sound business decisions franchisors make when structuring their franchise programs.

For decades, franchisors have successfully structured their franchise programs, and franchisors and franchisees have successfully operated their businesses, with substantial certainty about the "rules of the game" in the joint employer context. Absent "direct and immediate" control of the essential terms and conditions of employment of a franchisee's employees (*e.g.*, hiring, firing, wages/benefits, discipline, and supervision), franchisors would not be legally-responsible as "joint employers" for employment-type claims arising in connection with the operation of a franchised business. Decades of business relationships have been structured and decades of business decisions have been made accordingly. Long-term franchise agreements (many

extending 10 to 20 years) were written with those rules in mind and then signed by franchisors and franchisees. Those franchise agreements, conceived under what were well-established rules, continue to bind franchisors and franchisees immutably.

III. Conflict between Joint Employer and Trademark Law

What is the driving force behind the structure we find in the business format franchise model? The mandates of the Lanham Act, *i.e.*, the federal trademark statute. The Lanham Act's passage in 1946 validated the concept of *controlled* trademark licensing by recognizing that a trademark could function to identify product or service quality, even if the particular product or service did not emanate from a specific source. Indeed, for many years before the Lanham Act's passage, franchising as we know it today was not feasible because, under then-current trademark law, trademark licensing generally was not permitted because a trademark needed to identify the physical source or origin of the product or service with which the trademark was associated. Licensed third-party trademark users, as opposed to the trademark owner itself, of course could not be that ultimate source. The Lanham Act, however, was the end of the traditional "source identification" function of trademark use.

Part and parcel of the Lanham Act's recognition of a trademark's "quality" identification function was the notion that the trademark owner in fact had to police and *control* the quality of the products and services manufactured and sold by third-party licensees (deemed "related companies" under the Lanham Act) under the trademark in order to maintain brand consistency (whether high, low, or mediocre quality), regardless of the precise identity of the actual physical source of the products and services. Quality *control* remains paramount under the Lanham Act, and the trademark owner/licensor must be the ultimate source of the trademark quality standards under which products and services are manufactured and marketed.

Absent adequate control over the nature and quality of products and services that a licensee sells in association with a trademark, the trademark loses its "quality" identifying function, potentially jeopardizing the trademark's very purpose and ownership under abandonment principles. As Seventh Circuit Court of Appeals Judge Richard Posner once stated, the "economic function of a trademark is to provide the consuming public with a concise and unequivocal signal of the trademarked product's source and character, . . . and that function is thwarted if the quality and uniformity of the trademarked product are allowed to vary significantly without notice to the consumer." A trademark owner's failure to ensure the consistency of the trademarked item not only tarnishes the trademark's reputation but also can result in trademark forfeiture.

IV. Impact of the New Joint Employer Standard

What has *Browning-Ferris* done? At its core, it has dramatically, unforeseeably, and unpredictably altered the long-standing rules of the game I mentioned earlier. "Direct and immediate control" of the essential employment terms and conditions of another's employees no longer is the required lynchpin of a potential joint employer claim. After *Browning-Ferris*, direct *or indirect* control, or even an *unexercised reserved right to control*, the essential employment terms and conditions of another's employees will suffice for joint employer liability.

How does this adversely impact franchising? Numerous franchise systems operate within each of the 300 different business industries using franchising as a method for distributing products and services. Franchise systems are necessarily built on franchisor controls targeted at fulfilling the brand promise, satisfying consumer expectations, and protecting trademarks in accordance with the Lanham Act, as I described above. These controls run the gamut of, for example, training, production and delivery, presentation, customer service, days and hours of operation, physical appearance, social media use, advertising and marketing, supply chain, point-of-sale systems, and financial reporting. Yet new malleable and subjective concepts such as "indirect control" and "unexercised reserved right to control" promulgated by the NLRB pose a difficult dilemma for franchisors and franchisees. It is impossible for them to know, with any reasonable certainty, where the joint employer line will be drawn in their business relationships. Will the multiple controls franchisors exercise to protect their brands, for Lanham Act purposes and other legitimate business reasons, be second-guessed as crossing that line?

In one of the most famous phrases ever uttered in jurisprudence, U.S. Supreme Court Justice Potter Stewart remarked in a 1964 Supreme Court decision that, while he could not define the kinds of materials encompassed within hard-core pornography, "I know it when I see it." The problem with the NLRB's new *Browning-Ferris* joint employer standard is that because it is well-nigh impossible to define and apply multiple "control" concepts in franchise business structures, whose common threads and very essence are variety, differentiation, and innovation, it also is impossible for franchisors and franchisees to "know it when they see it."

Uncertainty and unpredictability in the joint employer area mean hundreds of franchisors with thousands of franchisees, whose franchise business models were structured operationally and economically under a long-standing set of rules, may unanticipatedly find themselves legally responsible for alleged franchisee workplace misconduct even though they have no involvement whatsoever in, or real practical control over, their franchisees' day-to-day, on-site operations and employee relations and supervision. The mere "unexercised, reserved right" to control some aspect of the franchisee's operation, having some perceived or inevitable nexus to or impact on the franchisee's employees' terms and conditions of employment, could be alleged by an overreaching and opportunistic government agency to be the basis for a joint employer claim.

Very few franchise systems in the crosshairs of a federal government agency investigation possess the financial wherewithal and other resources, as does a McDonald's Corporation, meaningfully to defend themselves. This Subcommittee knows quite well that McDonald's Corporation, the most well-known franchise brand in the world, now wages battle with the NLRB over the joint employer issue. However, the great preponderance of franchise systems operating in the United States would be gutted, if not driven out of business completely, if forced to defend a similar legal challenge. And that assumes they ultimately would prevail on the merits! There is a recurring misconception that all franchises are large multi-national corporations, like McDonald's Corporation. However, this is far from the truth. Ninety percent of all franchise systems in the United States have fewer than 300 units. A healthy majority of all such franchise systems have fewer than 100 units. Most franchisors of these franchise systems employ fewer than 50 people. Hardly the types of organizations that can withstand

investigations, let alone lengthy formal administrative and other proceedings, over vague standards.

Who knows which franchise system will be the next "test" case under the *Browning-Ferris* joint employer standard, and how that case, and the next one, and the one after that will ripple through the franchise community, all because one cannot predict under the new standard the circumstances where a franchisor crosses the new joint employer line. The new joint employer test is so broad and ambiguous that no contractual relationship, franchise or otherwise, is safe from a joint employer finding. That is why a bright-line test is essential.

Let us consider, for example, a franchisor wanting to train its franchisees on labor policy, particularly an issue of significance such as the anticipated new Department of Labor overtime regulations. May a franchisor host a webinar for its franchisees, give its franchisees sample job descriptions, or establish a hotline to help answer questions about this issue? What happens if franchisees implement the franchisor's suggestions or recommendations?

What about providing technology to help franchisees set labor schedules, bill their customers, and pay their employees, but franchisees determine and fully control labor ratios and their employees' pay and benefits? Is it determinative if a franchisor only makes recommendations about "best practices" and does not mandate franchisee conduct in the labor area?

Franchisee employee training covers outside and inside sales training, production training (how to manufacture products or provide services correctly), how to treat customers, how to implement local marketing, and more. To help franchisees select employees most likely to succeed, franchisors might have a third-party profile tool that helps franchisees assess the personality of employee candidates and whether they are a good fit for a specific position. Franchisees pay the third-party for each job candidate to take the profile. Franchisor staff helps the franchisee interpret the profile results.

These are just several examples of hundreds of different fact patterns that franchisors across myriad industries using the franchise model encounter daily in operating their franchise systems and interacting with franchisees and the franchisees' employees. Do any of them indicate joint employment under *Browning-Ferris*? The age-old response—"it depends on particular facts and circumstances"—does not cut it. Nuanced judgments are impractical in the franchise setting. How can franchisors practicably navigate these landmines without clear and unambiguous rules, like the joint employer standard in effect for decades before *Browning-Ferris*?

Some point to the NLRB Division of Advice's April 2015 memorandum in the *Freshii* case to assuage the franchise community's concern about the NLRB's intentions with the joint employer standard in the franchise space. However, *Freshii* is fool's gold for those genuinely caring about franchising. While the memorandum concluded that the franchisor, Freshii, was not a joint employer with its franchisee under either the old or the new joint employer standard, the decision did not create a blanket rule for franchising, it applied only to the specific facts in that case (which almost certainly will differ from the facts to be evaluated with every other franchisor), and, having been issued four months before *Browning-Ferris*, it has no precedential value whatsoever.

Existing franchisors found to be, or at material risk of being deemed, joint employers under the NLRB's new rule—due to historical controls imposed on franchisees given the franchise system's structure—will have the unenviable choice of (1) exercising even greater control over their franchisees' day-to-day operations in order to manage and limit employment-type risks (*i.e.*, creating a self-fulfilling joint employer prophecy), which will upend the franchisees' business independence and relegate these business owners to the role of middle managers, or (2) ratcheting back support, guidance, and training to franchisees to seek to avoid material joint employer risk, which will deny franchisees the very benefits they expected to receive when they joined the franchise system. All the while, to cover their increased legal exposure, franchisors will have no choice but to charge franchisees higher initial and ongoing fees. This will reduce the value of franchised businesses due to the franchisees' lower profit outlook and, in turn, the attractiveness of the franchise opportunity.

The uncertainty created by the NLRB's *Browning-Ferris* joint employer standard will have a chilling effect on franchising. Existing and nascent franchise organizations unsure of the new rules governing their conduct, and fearing their heightened legal risk, will abate or cease altogether their franchising activities. Perhaps they will have to force franchisees out of the brand because the economics no longer justify the relationship (and triggering an avalanche of litigation). They will opt instead to grow at a slower pace only through company-owned locations. New franchise systems will not materialize, stifling innovation and creativity. And a business model that in 2015 created an estimated 12,790 new businesses, generated 261,000 new jobs, and produced $8.9 billion of economic output will sputter and slowly atrophy.

Imagine how criminal that would be. Look at the IFA Educational Foundation's NextGen in Franchising program, which promotes, recognizes, and nurtures the creativity of budding entrepreneurs the world over who have conceptualized new businesses ripe for franchising. Failing to remove contrived obstacles to their growth counters the very essence of American ingenuity.

And what about the IFA's VetFran program, which provides career opportunities to veterans and their families to ensure an easier transition back into the civilian economy? Hundreds of franchise brands have teamed up voluntarily to offer financial discounts, mentorship, and training for aspiring veteran franchisees and veterans seeking employment. Under the VetFran program, over 238,000 veterans and military spouses have found employment opportunities, including 6,500 veterans who have become franchise business owners since 2011. Don't our veterans deserve to have unfettered business opportunities and to avoid being driven out of the very businesses they started after serving our country?

FRANdata, a leading Virginia-based franchise research firm, released a survey report in November 2015 entitled "FRANdata Key Findings and Survey Results: 2015 National Labor Relations Board Joint-Employer Ruling." After surveying industry leaders and stakeholders, conducting secondary research, and examining franchise company filings to assess the potential negative impact of the NLRB's *Browning Ferris* ruling on franchise businesses and, indirectly, on the economy, FRANdata concluded that:

- An estimated 40,000 franchise businesses, affecting more than 75,000 locations, are at risk of failure because of the joint employer ruling, which will increase labor and operating costs beyond operating margins.

- As a result of business failures, downsizing, and a decline in the rate of new franchise business formation, more than 600,000 jobs may be lost or not created.

- The equity value of franchise businesses is expected to drop by a third to a half. Rising costs will have a negative multiplier effect on valuations. Potentially, hundreds of thousands of franchise business owners will see the equity they have built in their businesses over years decline as the advantages of the franchise model are stripped away, causing higher operating costs.

States appreciate the inanity and dangers of *Browning-Ferris's* new joint employer standard for the franchise model and have acted boldly to revert to or even go beyond the traditional control standard. An ever-increasing number of states has passed "joint employer bills" clearly defining "employer" and explicitly preventing the franchisor from being considered a joint employer with its franchisee under state law. Shouldn't the federal government heed that same call by passing similar federal legislation?

V. Conclusion

All of us respectfully urge this Subcommittee to step forward and help reverse the NLRB's new joint employer standard, codify the joint employer standard that worked for decades before *Browning-Ferris*, and provide the certainty and energy necessary for the franchise model to grow and thrive and perform its critical functions for the American economy. Thank you sincerely for your consideration.

Corporate Office
Peoples Services, Inc.
2207 Kimball Rd. S.E.
Canton, OH 44707
Mail:
PO Box 20109
Canton, OH 44701
Phone: (330) 453-3709
Fax: (330) 453-5170

Peoples Cartage, Inc.
Canton, OH
Massillon, OH
Navarre, OH
Parkersburg, WV

Terminal Warehouse, Inc.
Akron, OH
Columbus, OH
Mogadore, OH
Simpsonville, SC
Norfolk, VA

Total Distribution, Inc.
Charlotte, NC
Canton, OH
Fremont, OH
Clyde, OH
Norwalk, OH
Moncks Corner, SC
Salem, VA
Charleston/Nitro, WV

Total Distribution Brokerage Service, Inc.
Massillon, OH

Central Warehouse Operations, Inc.
Saginaw, MI
Midland, MI
Dayton/Vandalia, OH

Crown Warehousing & Logistics, Inc.
Cleveland, OH

P-C Sales & Service, Inc.
Barberton, OH

Quick Delivery Service
Charleston/Nitro, WV

Warehousing

Transportation

Transloading

Packaging

Logistics

www.peoplesservices.com

Peoples Services, Inc.

March 16, 2016

Honorable Steve Chabot – OH 1
Chairman, Small Business Committee

Honorable Cresent Hardy - NV 4
Subcommittee Investigations, Oversight & Regulations

Honorable Alma Adams – NC 12
Subcommittee Investigations, Oversight & Regulations

Viktoria Ziebarth Seale
Counsel
House Committee on Small Business
Chairman Steve Chabot (R-OH)
2361 Rayburn HOB,
Washington, DC 20515

Dear Viktoria:

Thank you for your time on the phone and opportunity to share how changes to the long standing Joint Employer Rules by the NLRB will negatively impact our employees and business.

As mentioned the 3rd Party Warehousing Industry is one of the few industries that has been adding jobs over the last six years. Our trade association, the International Warehouse Logistics Association (IWLA) represents over 500 member companies, most family owned that play a critical role in the nations supply chain and economy. We are the people that get products from the manufacturer to the end users or distributors. We do not take ownership or title to the products but manage the inventory on behalf of our customers. We handle everything from food related products to manufactured goods including electronics, retail, chemicals, consumer products, pharmaceuticals and raw materials.

Our member companies and its thousands of employees help drive the national economy. We make manufacturers more competitive and help consumers save money through the value added services we offer that include packaging, repackaging, light manufacturing, transportation and inventory management.

Our own company, Peoples Services, Inc. has almost tripled in size since 2010 by growing our existing business and acquiring other companies. We operate 35 locations in six states including Ohio, Michigan, West Virginia, Virginia, North Carolina and South Carolina. We have invested over $50,000,000 in real estate and capital investment in just the last five years. We have added 100 jobs in addition to the over 400 jobs retained form our existing business and the companies we acquired.

We are the 2012 Small Business Administration (SBA) Family Business of the Year for the State of Ohio and the Midwest Region. We are a partial Employee Stock Ownership Program (ESOP) company that consistently shares the profits with our employees.

Many of our customers are fortune 1000 companies that are recognized names that include DOW, BASF, Bayer Chemicals (Covestro), Heinz/Kraft, Alcoa, DuPont, Lanxess, Kraton and Whirlpool to name a few but also help many locally owned businesses get their products to and from markets.

We spend approximately $30,000,000 per year in wages and fringe benefits. Just under 10% of this expenditure is related to temporary or contract labor. This labor is used for temporary to hire for permanent jobs and for short term project work such as the one-week distribution of Girl Scout cookies in NE Ohio to building seasonal displays to Christmas retail season. Our temporary labor company partners allow us to have the flexibility we need for these short term temporary projects. We also utilize these partners to help screen potential full time candidates.

Our employees have healthcare, dental, life insurance, short term disability 401K and profit sharing. We have been averaging 6% of employees' wages in profit sharing each year. (Employees working more than 1,000 hours per year are eligible for profit sharing).

Almost all of my management team has worked their way up through the rank. Many of our supervisors and managers have started as part time or temporary employees and were later hired and promoted due to their hard work and initiative. This is not just typical to our company but is consistent across our industry.

We appreciate your time in getting to learn about our industry and the critical role we play in our nations and the world's economy. BY making the supply chain more efficient, we save consumers money and make US Manufacturers more competitive.

We are very proud of more than one hundred year history and our many multi-generation employees. Changes to the more than 30 years of legal precedent Joint Employer definition will threaten our ability to have the flexibility our customers demand and reduce the activity we are able to fulfill.

Should you need further information, please do not hesitate to call me.

Respectfully submitted,

Douglas J, Sibila
President/CEO
Peoples Services, Inc.
dsibila@peoplesservices.com
330-453-3709

cc: Patrick O'Connor, Government Affairs, IWLA
Steven DeHaan, President, IWLA

March 17, 2016

Crescent Hardy, Chairman
U.S. House Small Business Subcommittee on
Investigations, Oversight and Regulations
Washington, D.C. 20515

Re: Hearing on "Risky Business: Effects of New Joint Employer Standards for Small Firms"

Dear Chairman Hardy:

On behalf of the National Restaurant Association, I want to thank you for the oversight your Committee is providing through today's hearing on "Risky Business: Effects of New Joint Employer Standards for Small Firms." I would also like to ask you to introduce these comments for the record.

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help members build customer loyalty, rewarding careers and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets employing 14 million people—about ten percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

I appreciate the attention this Committee is placing on the impact that the changes the National Labor Relations Board ("NLRB") is making to the "joint-employer" standard is having on the franchise business model in particular. Nevertheless, I am submitting this statement for the record to emphasize that the negative consequences of those changes go much deeper than that.

The ongoing attempts by the NLRB to change the joint-employer standard are bad for workers, employers, franchises, and the economy. In May of 2014, in the *Browning-Ferris* case, the NLRB issued a notice calling for briefs from interested parties to address whether the NLRB should obey the legally established joint-employer standard or create a new one.

The National Restaurant Association filed comments arguing that the historic standard should be maintained because any deviation from the, then, existing standard would seriously and adversely affect the nation's restaurant and food service industries. In addition, no new circumstances had arisen since the standard was clarified thirty years ago to justify modifying or overturning prior decisions. Meanwhile, the NLRB's General Counsel's filed his own brief seeking to assail the joint-employer standard that has been the bedrock of American business relationships for the last three decades.

Prior to the decision in *Browning-Ferris* coming out, during several Congressional hearings, some of my Association's members highlighted the threat the changes to the joint-employer relationship envisioned by the NLRB posed to our industry. Witnesses were told that there was nothing to fear and that the NLRB would be impartial. In fact, the U.S. House Education & Workforce Committee Ranking Member stated, "I'm a little baffled…I don't think this will be a problem for [Restaurants]…I haven't heard any evidence that indicates to me that there is any reason to believe that this board won't be fair minded."

However, the concerns raised by the witnesses were both real and well founded. On August 27, 2015, in a split 3-2 vote, the NLRB issued its decision in *Browning-Ferris*. In it, the NLRB changed the application of the joint-employer standard to allow for an entity to be considered to be a joint employer even if it does not actually exercise any control over the terms and conditions of employment of another entity's employees.

Instead, the joint-employer status under *Browning-Ferris* can be found under a new "reserved authority" theory if an entity could, by contractual relationship or otherwise, at some point in the future control the terms and conditions of employment of the other entity. Furthermore, the NLRB also held in *Browning-Ferris* that joint-employer status could also exist if one entity exercised "indirect control" through a third party. In its decision, the majority disregarded the decades old joint-employer standard in favor of these new unclear "reserved authority" and "indirect control" theories, making employers potentially liable for employees they do not employ—jeopardizing business partnerships in all industries.

The NLRB's proposed changes, if *Browning-Ferris* is allowed to stand, to the existing joint-employer standard could have profound negative effects on a company's ability to use temporary employees, staffing agencies, leased employees or other contingent workers. This is particularly so for companies in our industries, which rely on these contingent workers to supplement their own workforces.

If the standard is allowed to change, as proposed by the NLRB, companies could begin to find themselves held vicariously liable for violations of Section 7 of the National Labor Relations Act ("NLRA") for depriving a temporary employee's right to form a union and for violations of Section 8(a)(3) of the NLRA for unlawful discipline or discharge of a temporary employee that are committed by entities completely outside of their control.

Additionally, if the staffing agency's employees are represented by a union, these companies may be unwittingly subjected to the staffing agency's collective bargaining obligations under Section 8(a)(5) of the NLRA. As a result, companies may be compelled to change their business models and terminate their contracts with staffing agencies because of their potential harmful and/or unpredictable ramifications.

For the last thirty years, companies have comported themselves and organized their businesses on the basis of a clear joint-employer standard. They did so based on the reasonable assumption that a standard that has been consistently applied for three decades without controversy would continue to be applied in the same manner going forward. The proposed changes by the NLRB

through its decision in *Browning-Ferris* are jeopardizing these companies and the stable environment in which contingent employees, unions and companies have operated.

Finally, I would like to offer our help to protect the long settled joint-employer standard that existed prior to the controversial decision in *Browning-Ferris*. As stated, the changes proposed by the NLRB and its General Counsel are detrimental not only to the franchise model, but to the economy as a whole.

Sincerely,

Angelo I. Amador, Esq.
Senior Vice President & Regulatory Counsel

Submission for the record

to the

Small Business Committee

of the

United States House of Representatives

on behalf of

NATSO, Representing America's Travel Plazas and Truckstops

for the Hearing:

"Risky Business: Effects of New Joint Employer Standards for Small Firms"

David H. Fialkov
Vice President, Government Affairs
Legislative and Regulatory Counsel
NATSO
703-739-8501
dfialkov@natso.com

The National Association of Truckstop Operators (NATSO), representing America's travel plazas and truckstops, submits this statement for the record with respect to the House Small Business Committee March 17, 2016 hearing regarding "The Effects of New Joint Employer Standards for Small Firms."

By way of background, NATSO is a national trade association representing travel plaza and truckstop owners and operators. NATSO's mission is to advance the success of truckstop and travel plaza members. Since 1960, NATSO has dedicated itself to this mission and the needs of truckstops, travel plazas, and their suppliers by serving as America's official source of information on the diverse industry. NATSO also acts as the voice of the industry on Capitol Hill and before regulatory agencies. NATSO currently represents approximately 1,400 travel plazas and truckstops nationwide, comprised of more than 1,000 chain locations and more than 300 independent locations, owned by approximately 200 corporate entities. Approximately 80 percent of NATSO members' facilities are located within one-quarter mile of the Interstate Highway System, serving interstate travelers exiting the highway and serving as the "home away from home" for the nation's professional truck drivers.

Efficient and effective operations at truckstops and travel plazas allows NATSO's members to sell products to the trucking industry and the American public at lower costs. This makes the costs of traveling less expensive and lowers the costs of transporting goods by truck, which can serve to make all goods more affordable.

NATSO's members operate in a diverse and evolving industry. Every travel center and truckstop includes multiple services, from motor fuel sales to auto-repair and supply shops, to hotels, sit-down restaurants, quick-service restaurants and food courts, and convenience stores. It is an evolving industry that once was tailored primarily to truck drivers, and now caters to the entire traveling public, as well as the local population that lives in close proximity to a travel center location.

NATSO's members are uniquely positioned to address the new joint employer standard because they will experience it as both franchisors and franchisees. Indeed, some of the larger truckstop chains have franchise locations throughout the country; at the same time, many travel plaza owners and operators – from large chains to independent operators – are franchisees of chain restaurants. Some are also hotel franchisees.

The comments that follow will provide a brief overview of how the new joint employer standards will impact NATSO's members, and will conclude by placing these new standards into the larger context of the executive branch's efforts to expand the universe of workers for which employers are responsible for providing benefits. Although well-intentioned, these efforts will result in harming the very individuals that they are designed to protect.

New Joint Employer Standards' Effect on NATSO Members

As the Committee undoubtedly knows, the National Labor Relations Board (NLRB) recently announced a new legal standard for determining if a business is the "joint employer" of individuals employed by another business. Under the new standard, the NLRB will consider two or more businesses to be joint employers if they share or codetermine those matters governing the "essential terms and conditions of employment." Specifically, the NLRB will no longer require that a joint employer *exercise* the authority to control employees' terms and conditions of employment, but simply *possessing or potentially possessing* that authority may be sufficient for a joint employer finding.

A joint employer finding has serious consequences for a business. It could require a business to engage in collective bargaining with a union that represents (or seeks to represent) a subcontractor's or franchisee's / franchisor's employees. It could also lead to shared liability for unfair labor practices committed against a subcontractor's or franchisee's / franchisor's employees.

This has potentially dramatic consequences for the travel plaza and truckstop industry. Beyond the franchisor-franchisee context, travel plazas work with a number of contract workers such as equipment inspectors and fuel delivery personnel. The nature of this work is such that our members – acting responsibly – may provide detailed instructions as to how equipment must be inspected to ensure that there are no substance leaks, or when fuel must be delivered to minimize disruptions and potential dangers. An expanded joint-employer standard could *penalize* truckstop owners by viewing these work requirements as indicia of a joint employer relationship.

The NLRB's previous joint employer standard required that control over another entity's employees must be "direct and immediate" in order for joint employment to exist. This standard was easy to understand and easy to apply in practice. It enabled NATSO's members – large and small – to enter into a variety of business relationships with the confidence that they would not be held responsible for another entity's employees. They knew that they could provide high-level requirements for their business partners' employees (minimum training levels; inspection and delivery methods; etc.) and not be considered joint employers provided they did not affect the *terms and conditions of employment* (hiring; firing; work schedules; wages; etc.)

That certainty is now gone. Beyond the ambiguous, high-level dicta provided in the NLRB's decision in *Browning-Ferris Industries, Inc.*[1], there is very little guidance that NATSO's members can refer to when determining whether they may be joint employers with other entities with whom which they have contractual

[1] 362 NLRB 186, slip op. (August 27, 2015).

relationships.[2] What is an acceptable level of "control" over contractors' methods without becoming a joint employer? How much of this control may actually be exercised?

This uncertainty creates a risky and undesirable business environment for NATSO members. The consequences will be real and harmful.

Some companies may fear that they will be considered joint employers with all of their contractors, franchisees, etc., and decide to exert significantly *more* control over those entities' day-to-day operations in order to mitigate liability exposure. This will entail high administrative costs and an inefficient use of employees' time and energy. NATSO members may need to be more involved in who equipment inspectors hire and how many hours these individuals work per week. At the same time, in their capacity as franchisees they will be relegated to middle managers if the franchisor understandably elects to impose near total control over their franchisees. NATSO members will lose decision-making authority (work schedules, hiring/firing, wages, etc.) with respect to their chain restaurant franchises. The value of these franchises as ongoing business concerns will diminish substantially.

Other companies may take the opposite approach and try to *avoid* joint employer relationships by exerting significantly *less* control over their contractors and/or franchisees. This will also lead to undesirable consequences: Fuel retailers will be disincentivized from ensuring that their contractor-equipment inspector completes his work adequately for fear that micro-managing this process will lead to joint employer status. Franchisors may be less inclined to assist their franchisees on matters unrelated to core issues affecting the franchise brand, when such assistance on matters such as store appearance, product preparation and customer satisfaction. These are the primary reasons for operating as a franchisee. Some franchisors may reduce their use of the franchise model entirely.

All of these results will make it harder for NATSO's members to grow their businesses and create jobs.

---

[2] The NLRB's nonbinding memorandum opinion on whether Freshii, a restaurant franchisor, should be held responsible as a joint employer is of little practical utility. *See* Advice Memorandum from Barry J. Kearney, Assoc, Gen. Counsel, Div. of Afvice, Office of the Gen. Counsel NLRB to Peter Sung Ohr, Reg. Dir., Region 13 (April 28, 2015) (concluding that Freshii was not a joint employer). First, as a nonbinding advice memorandum it has no precedential effect and thus cannot be responsibly relied upon by other businesses. Second, the case was not representative of most franchisor-franchisee relationships because Freshii exerts *far* less control over its franchisees than is the case with most franchisor-franchisee relationships.

The New Joint Employer Standard in Context

The NLRB's *Browning-Ferris* case is significant but should not be viewed in a vacuum. The NLRB administers and enforces the National Labor Relations Act (NLRA), which protects employees' right to organize and collectively bargain and defines what are considered to be unfair labor practices by employers. These are important issues but their scope is limited.

The real significance of the NLRB's new joint employer standard is that it reflects a larger trend in the executive branch to expand the scope of individuals for whom employers are responsible for providing benefits. Shortly after the NLRB's decision in *Browning-Ferris*, the Department of Labor issued its own revised interpretation[3] of when two separate employers could be deemed joint employers and found jointly liable for purposes of the Fair Labor Standards Act, which establishes minimum wage and overtime standards for most private sector employees. This guidance, like the NLRB's new approach, expands the definition of joint employer.[4] This is particularly significant given two parallel Department of Labor initiatives: An effort to expand the universe of employees entitled to overtime pay,[5] and new guidance that substantially narrows the definition of an "independent contractor."[6] Additionally, the Occupational Safety and Health Administration (OSHA) has reportedly issued an internal memorandum encouraging its investigators to conduct a joint-employer analysis when investigating alleged offenses. The memo outlines a joint-employer standard that is remarkably similar to that outlined by the NLRB in *Browning-Ferris.*

Additionally, the NLRB is in the process of an unfair labor practice trial against McDonald's alleging that the restaurant franchisor is a joint employer with nearly 80 of its franchisees. This case, if resolved in favor of the board, would dramatically alter the legal and economic landscape surrounding the franchise business model.

Thus, the new joint employer standards represent a trend that has implications beyond the NLRB but throughout virtually all of the labor regulations in the United States.

---

[3] *See* DOL AI No. 2016-1.

[4] Specifically, it for the first time distinguishes between *horizontal* joint employment and *vertical* joint employment, providing a list of examples of both and describing various factors to be used to assess joint employment.

[5] *See* 80 Fed. Reg. 38516 (July 6, 2015) (proposing to increase the salary threshold for exempt employees and considering revising the so-called "duties test" to limit the white collar exemption to employees that perform virtually no ministerial duties).

[6] DOL AI No. 2015-1 (July 15, 2015) (implying that most, if not all, individuals treated as independent contractors by employers are inappropriately classified as such and should in fact be treated as employees under the Fair Labor Standards Act).

But it doesn't stop there. Being considered a joint employer means a small business could have legal exposure under various statutes that contain specific small business exemptions. These statutes include Title VII of the Civil Rights Act and the employer mandate under the Affordable Care Act, among others. The potential legal liability created by this new joint employer standard cannot be overstated.

Conclusion

NATSO reiterates its appreciation to the Small Business Committee for highlighting the serious problems associated with the NLRB's new joint employer standard. As representatives of an industry that will be uniquely harmed by this new standard, and the larger trend of which it is a part, we urge Congress to intervene and return the joint employer standard to the efficient, effective rule that had been in place for more than thirty years before the *Browning-Ferris* case.

NFIB
The Voice of Small Business.

March 17, 2016

The Honorable Cresent Hardy
Chairman
Subcommittee on Investigations, Oversight, and Regulations
U.S. House Small Business Committee
2361 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Hardy:

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I write to thank you for holding the hearing, *Risky Business: Effects of New Joint Employer Standards for Small Firms*. This hearing represents an important opportunity to address the profound uncertainty for small businesses created by the National Labor Relations Board (NLRB). Their decision in the *Browning Ferris Industries* case overturns decades of precedent by inventing a new joint employer standard.

NFIB supports restoring the previously long-standing joint employer standard for determining liability in employer-employee disputes. The recently adopted change to the standard by the NLRB, the previous version of which had been in place for over 30 years, would lead to a small business owner's diminished control over his/her business. The new, broader standard would also lead to a loss of jobs, stifle economic growth, and upset long-standing employer-employee relationships. This new standard would make it harder for independent business owners to build and operate effective, profitable local businesses.

Thank you for addressing this damaging new standard that will cause further government overreach at the expense of small business growth and development. We look forward to the outcome of the hearing and to working with you to secure needed regulatory relief from the new joint employer standard.

Sincerely,

Amanda Austin
Vice President
Public Policy

National Federation of Independent Business
1201 F Street NW * Suite 200 * Washington, DC 20004 * 202-554-9000 * Fax 202-554-0496 * www.NFIB.com

○